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Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

JARRETT E. WOODS, JR., JOSEPH L. BIEGEL, WESTERN SAVINGS ASSOCIATION, AND WESTERN CAPITAL CORPORATION,
Petitioners,

v.

FEDERAL HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, WALTER FAULK, DAVID BRADLEY, EDWIN J. GRAY, JOSEPH SELBY, AND WESTERN FEDERAL SAVINGS AND LOAN ASSOCIATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether a government agency, consistent with the requirements of due process, the taking clause, and the applicable statute, 12 U.S.C. § 1464(d)(6)(A), may deprive persons of their property *ex parte*, without any pre-deprivation hearing, and subject only to a post-deprivation judicial hearing where the court, in a summary proceeding, denies the deprived persons any ability to take discovery, cross-examine or otherwise challenge the grounds for the deprivation, and merely examines, under the arbitrary and capricious standard of review, the evidence, secretly and unilaterally compiled by the government, to see if that evidence, or the portion thereof which the government chooses to present to the court, supports the deprivation?

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JARRETT E. WOODS, JR., JOSEPH L. BIEGEL, WESTERN SAVINGS ASSOCIATION, AND WESTERN CAPITAL CORPORATION,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on August 27, 1987, which affirmed the decision of the United States District Court for the Northern District of Texas in this case.

OPINIONS BELOW

The unreported opinion of the district court is set forth in Appendix B, *infra* pp. 30a-41a. The opinion of the Court of Appeals is reported at 826 F.2d 1400. It is reprinted in Appendix A, *infra*, pp. 1a-29a.

JURISDICTION

The judgments of the district court were entered on October 22, 1986 (App. C, *infra*, pp. 42a-43a), and on April 9, 1987. App. C, *infra*, pp. 44a-45a. The judg-

ment of the Court of Appeals was entered on August 27, 1987. App. D, *infra*, p. 46a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that—

> No person shall * * * be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Section 5(d)(6)(A) of the Home Owners' Loan Act ("HOLA") of 1933, as amended, 12 U.S.C. § 1464(d)(6)(A), provides:

> (A) The grounds for the appointment of a conservator or receiver for an association shall be one or more of the following: (i) insolvency in that the assets of the association are less than its obligations to its creditors and others, including its members; (ii) substantial dissipation of assets or earnings due to any violation or violations of law, rules, or regulations, or to any unsafe or unsound practice or practices; (iii) an unsafe or unsound condition to transact business; (iv) willful violation of a cease-and-desist order which has become final; (v) concealment of books, papers, records, or assets of the association or refusal to submit books, papers, records, or affairs of the association for inspection to any examiner or to any lawful agent of the Board. The Board shall have exclusive power and jurisdiction to appoint a conservator or receiver. If, in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein provided exists, the Board is authorized to appoint ex parte and without notice a conservator or receiver for the association. In the event of such appointment, the association may, within thirty days thereafter, bring an action in the

United States district court for the judicial district in which the home office of such association is located, or in the United States District Court for the District of Columbia, for an order requiring the Board to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver. Upon the commencement of such an action, the court having jurisdiction of any other action or proceeding authorized under this subsection to which the association is a party shall stay such action or proceeding during the pendency of the action for removal of the conservator or receiver.

STATEMENT

The Federal Savings and Loan Insurance Corporation ("FSLIC") is a federal agency organized pursuant to Title IV of the National Housing Act, as amended, 12 U.S.C. §§ 1724-1730f. The FSLIC insures the accounts of eligible state-chartered savings and loan associations, various savings banks, and all federal savings and loan associations. 12 U.S.C. §§ 1724-1730f. The FSLIC operates at the direction of the Federal Home Loan Bank Board (the "Board").

The Board is a federal agency organized pursuant to the Federal Home Loan Bank Act, 12 U.S.C. §§ 1421 *et seq.* The Board has regulatory authority over federally insured state and federally chartered savings and loan associations pursuant to the Home Owner's Loan Act of 1933, 12 U.S.C. §§ 1461, *et seq.*

In the late afternoon of September 12, 1986, agents of the Board, without any prior notice to Petitioners, forcibly seized control of Petitioner Western Savings and Loan Association ("Western"), including each of its eighteen offices located throughout the State of Texas and its mortgage banking subsidiaries located nationwide. The taking of Western included the complete con-

fiscation of Western's assets and records and the discharge of each of the individual Petitioners.

Prior to this taking, the Board had taken no action with respect to any alleged violation of law or regulation, or any alleged write-down of asset value. In fact, the last action that had been taken by the Board occurred over two years prior to the taking, and had resulted, after negotiation, in a stipulated cease and desist order. None of the matters covered by the stipulated cease and desist order formed any of the alleged bases for the taking. Petitioners, therefore, were provided no structured opportunity to be heard as to the allegations made by the Board prior to its taking. There was no administrative hearing.

The Board's taking of Western was premised upon the Board's allegations, under 12 U.S.C. § 1464(d)(6)(A), that Western was insolvent, that Western had suffered a substantial dissipation of assets, and that Western was in an unsafe and unsound condition to transact business. These allegations were based solely upon the manifestly incomplete and inaccurate evidence secretly and unilaterally compiled by the Board without the opportunity for participation or explanation by Petitioners in any proceeding that can be called a hearing. On these bases, the Board seized Western and appointed the FSLIC as a receiver for Western with broad statutory powers to cancel any and all of Western's contracts and to liquidate any and all of Western's assets. The FSLIC immediately exercised its power as receiver by transferring all of Western's assets to the newly formed Western Federal Savings and Loan Association ("WFSLA"), leaving Western a mere shell. As a result, WFSLA, itself, has controlled all of Western's assets, with unrestrained authority to manage and dispose of those assets and to cancel any contracts.

In accordance with the statutory framework for contesting the Board's action under HOLA, 12 U.S.C.

§ 1464(d)(6)(A), Petitioners filed an amended complaint in an existing action[1] to include a count seeking removal of the receiver. Because the FSLIC, upon its appointment as receiver, immediately disposed of all of Western's assets by transferring them to WFSLA, Petitioners also sought, in the district court, certain interim relief designed to preserve the status quo which existed prior to the FSLIC's transfer of Western's assets. Petitioners took this action to secure their rights to a constitutionally and statutorily required hearing at which meaningful relief could be granted.

The district court, however, denied Petitioners' request for such interim relief, holding that (i) Petitioners had not met the four-part test for injunctive relief in the Fifth Circuit, and (ii) alternatively, that the Court, under 12 U.S.C. § 1464(d)(6)(C), lacked jurisdiction to grant injunctive relief.[2]

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[1] Petitioners originally filed a lawsuit challenging, *inter alia*, the validity of two Board regulations (the "New Regulations"). These are 12 C.F.R. § 561.16c (the "Classification Regulation"), and recently amended portions of 12 C.F.R. § 563.17-2 (the "Re-evaluation Amendment"). Pursuant to the application of the New Regulations, the Board had alleged that Western was insolvent. Petitioners continued their challenge to the New Regulations after the Board's seizure of Western. However, because the Board contended that it had not relied on the New Regulations in appointing the receiver, and because the record as to the New Regulations was incomplete, Petitioners, while continuing their challenge to the New Regulations, requested that the validity of the New Regulations not be addressed on Respondents' Motion For Summary Judgment. The district court did not address the validity of the New Regulations.

[2] Petitioners appealed the district court's denial of interim injunctive relief. The Court of Appeals, however, did not address that issue, having determined that the question would be moot in the event that it held, as it did, that the appointment of the receiver was proper. Petitioners intend to seek appropriate injunctive relief in the district court in the event they are successful before this Court.

After the district court's denial of Petitioners' request for interim injunctive relief, Petitioners continued their action to remove the receiver under 12 U.S.C. § 1464 (d) (6) (A). That statute, in accordance with constitutional requirements, specifically directs the district court to review the Board's appointment "upon the merits" to determine if the receiver should be removed. Since there was no hearing afforded Petitioners prior to seizure, the statutory hearing "upon the merits" in the district court is Petitioners' only opportunity to challenge the appointment of the receiver and the *ex parte* seizure of Western's assets. Petitioners, in the district court sought discovery in order to develop their case and make meaningful the hearing "upon the merits" to which Petitioners are entitled.

Respondents, however, immediately sought to block Petitioners' attempt to develop their case and be heard in a meaningful manner by moving for summary judgment, and seeking a stay of discovery until the district court ruled upon that motion. Respondents in making these motions first took the position that the only evidence that the district court could review in determining whether the receiver was properly appointed was the one-sided evidence submitted by the Board itself. This evidence, the so-called "Administrative Record," consisted solely of the items that the Board chose to submit to the district court in order to support the taking. Further, this evidence was secretly and unilaterally compiled by the Board without the participation of Petitioners or any opportunity for challenge by Petitioners. In the words of Stevens, J., in *Brock v. Roadway Express, Inc.*, 107 Sup. Ct. 1740, 1756 (1987) (dissenting in part), it was "uncrossexamined and untested."

Respondents further took the position that the Board's decision to appoint the receiver for Western should be sustained if, under the arbitrary and capricious stand-

ard of review, the Board's decision was supported by the Board's own, unilaterally selected evidence.

Petitioners opposed Respondents' positions because they would deny them a hearing conducted in a meaningful manner.[3] The district court, however, upheld Respondents' positions, and granted Respondents' motion for summary judgment, thus effectively granting Respondents' motion to stay discovery.

Petitioners appealed both decisions of the district court to the Court of Appeals. As to the district court's denial of interim relief, Petitioners argued that the interim relief which they sought to preserve their absolute right, under the applicable statute and the Constitution, could be granted without having to meet the four standards

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[3] Specifically, Petitioners opposed Respondents' positions on the following grounds:

1. Genuine issues of material fact are evident even in the absence of discovery.
2. Motions for summary judgment should only be made and ruled upon if, *after* discovery, no genuine issues of material fact are found to exist.
3. Petitioners' constitutional right to be heard entitles them to discovery in order to meet the evidence presented by the Board before a motion for summary judgment may be ruled upon.
4. Petitioners' statutory right to a hearing "upon the merits" entitles them to a de novo hearing and discovery of the facts at issue, unrestricted by the limits of the Board's incomplete administrative record.
5. Petitioners are entitled to a de novo hearing under the Administrative Procedure Act and the principles enunciated by the Supreme Court in the *Overton Park* and *Camp* cases.
6. Even under an arbitrary and capricious standard of review, Petitioners are entitled to a searching inquiry into the "whole" record.
7. Petitioners are entitled to contemporaneous construction discovery to support their challenge to the validity of certain newly enacted regulations.

for injunctive relief in non-constitutional cases. Petitioners also argued that the district court had jurisdiction to grant injunctive relief under the applicable statute.

The Court of Appeals did not address the Petitioners' appeal from the district court's denial of Petitioners' request for interim relief, but confined its consideration to their appeal from the district court's grant of summary judgment. The Court of Appeals found that the district court correctly applied the arbitrary and capricious standard in reviewing the Board's appointment of the FSLIC as receiver for Western, that no genuine issue of material fact existed as to whether the Board's decision was supported by the Board's evidence, and that such review, under 12 U.S.C. § 1464(d)(6)(A), was constitutional and did not deny Petitioner due process. As a result, the Court of Appeals affirmed the district court's grant of summary judgment.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE RAISES IMPORTANT ISSUES OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT

The Board and the FSLIC oversee the regulation of numerous savings and loan associations and savings banks across the nation. These federal agencies, like many others, have been granted, as part of their regulatory powers, the ability to deprive persons of their property.

Similar powers, relating to the regulation of other types of financial institutions, are held by the Federal Deposit Insurance Corporation (the "FDIC"). *See, e.g.*, 12 U.S.C. § 1818. In fact, this Court recently has noted probable jurisdiction in a case, similar to the present, involving the FDIC's power to suspend a person as an officer and a director of a bank. *See FDIC v. Mallen*, No.

87-72. The issues in that case, like the present case, involved the deprived person's rights to a meaningful hearing at a meaningful time. Because the district court in *Mallen* found that the procedures utilized by the FDIC did not provide a meaningful hearing at a meaningful time, it held that the statutory provisions that provided for the FDIC's procedures were unconstitutional.

This Court has frequently found that issues involving powers of federal agencies to deprive persons of their property are issues which this Court should review. Moreover, the issues presented in this case are ones which are certain to recur before the lower courts in many parts of the land. There have been a number of judicial decisions in this area, and as recognized by the Court of Appeals below at App. 12a-13a, these are in conflict. A decision by this Court will help determine the proper exercise of agency powers in view of applicable statutory and constitutional requirements.

II.

THE LOWER COURTS MISCONSTRUED THE APPLICABLE DECISIONS OF THIS COURT BY UPHOLDING RESPONDENTS' TAKING OF PETITIONERS' PROPERTY WITHOUT AFFORDING THEM A MEANINGFUL OPPORTUNITY TO MEET, REBUT OR CONTEST THE TAKING

A. The Lower Courts Denied Petitioners a Hearing In a Meaningful Manner

This Court clearly has recognized, and has established as the usual course of judicial proceedings, that a party deprived of property by a government agency has a right under the Constitution to notice and an opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Moreover, as this Court has held, "[i]t is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a

meaningful manner.'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), *reh'g denied*, 409 U.S. 902 (1972), *quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

The right to a hearing conducted "at a meaningful time and in a meaningful manner" is designed to "'minimize substantively unfair or mistaken deprivations of' life, liberty, or property by enabling persons to *contest* the basis upon which a State proposes to deprive them of protected interests." *Carey v. Piphus*, 435 U.S. 247, 259-60 (1978) (emphasis added), *citing Fuentes*, 407 U.S. at 81; *see also Brock v. Roadway Express, Inc.*, 107 Sup. Ct. 1740, 1748 (procedures must provide a reliable initial check against mistaken decisions). Moreover, this Court has held that "the right to procedural due process is 'absolute,'" and that "the law recognizes the importance to organized society that those rights be scrupulously observed . . . ." *Carey*, 435 U.S. at 266. *See also Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915); *Fuentes*, 407 U.S. at 87; *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541-45. As articulated by this Court:

> It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."

Fuentes, 407 U.S. at 81, *quoting Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-72 (1951).

"In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). "An opportunity to meet and rebut evidence utilized by an administrative agency has long been regarded as a primary

requisite of due process." *Ralpho v. Bell*, 569 F.2d 607, 628 (D.C. Cir. 1977).

In *Brock*, this Court recently reiterated the constitutional requirements for a hearing conducted in a meaningful manner and applied them to a situation, less onerous than the instant situation, involving a *temporary* deprivation of a property right. The Court found that minimum due process required (i) "notice of . . . allegations," (ii) "notice of the substance of the relevant supporting evidence," (iii) "an opportunity to submit a written response," (iv) "an opportunity to meet with the investigator," and (v) an opportunity to "present statements from rebuttal witnesses." *Brock*, 107 Sup. Ct. at 1748.

None of these procedures has ever been afforded to Petitioners, who have suffered what the Board intended to be a *permanent* deprivation. Indeed, the Court of Appeals determined that *Fuentes* is not applicable to the present case. But the fact remains that Congress, in accordance with constitutional requirements, and the usual course of judicial proceedings, enacted HOLA to permit persons such as Petitioners to obtain review of the Board's appointment of a receiver. Specifically, HOLA provides,

> In the event of [an appointment of a receiver], the association may, within thirty days thereafter, bring an action in the United States district court . . . for an order requiring the Board to remove such conservator or receiver, and the court shall *upon the merits* dismiss such action or direct the Board to remove such conservator or receiver . . . .

12 U.S.C. § 1464(d)(6)(A) (emphasis supplied).

Yet, the lower courts here looked solely at the manifestly incomplete, inaccurate, and one-sided evidence prepared by the Board, and, without providing Petitioners any discovery or evidentiary hearing, granted summary judgment upholding respondents' taking. What makes

these actions particularly egregious is the fact that Petitioners *never, at any point,* participated in any meaningful way in an ordered fact finding process before an impartial tribunal. Therefore, no step was previously taken, and the district court took no step, as this Court has found to be required, to minimize a mistaken deprivation of property by providing an initial check against a mistaken decision. Indeed, Petitioners have shown, even without discovery, that mistakes were made by the Board. The lower courts' decisions therefore should be reversed and the action remanded to the district court with direction to permit Petitioners the opportunity to develop their case and contest the taking of their property in a manner consistent with their constitutional and statutory due process rights.

B. The Lower Courts Denied Petitioners the Decision "Upon the Merits" to Which They Are Entitled Under the Applicable Statute

(1) *The Statute Requires a Decision "Upon the Merits"*

The clearly applicable statute specifically provides for a hearing "upon the merits." 12 U.S.C. § 1464(d)(6)(A). This language has been construed, as required in the normal course of judicial proceedings, by some courts to require *de novo* review of the facts at issue. For example, in *Telegraph Savings & Loan Association v. FSLIC*, 564 F. Supp. 862, 869 (N.D. Ill. 1981), *aff'd*, 703 F.2d 1019 (7th Cir. 1983), *cert. denied*, 464 U.S. 992 (1983), the court concluded that:

> In defining our proceeding as one "on the merits" rather than one "on the record" [for which the substantial evidence standard of review generally applies], the statute seems to require not an appellate-type proceeding but rather an exercise of this court's *de novo* jurisdiction.
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> * * * *
>
> The question presented to the court in the instant case raises important due process interests which can

> be resolved only through a detailed exploration of factual matters, viz., whether Telegraph was insolvent or in an unsafe and unsound condition at the time it was committed to a receiver.

Similarly, the court in *Fidelity Savings and Loan Ass'n v. FHLBB*, 540 F. Supp. 1374, 1377 (N.D. Cal. 1982), *rev'd on other grounds*, 689 F.2d 803 (9th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983), stated "If it means nothing more, the term 'on the merits' reveals that a proceeding under this statute is more in the nature of a *de novo* review than an appellate review." The court went on to hold, in recognition of the due process considerations discussed above, and the fact that no adversarial hearing had been held, that the association seeking removal of the receiver was entitled to a "full adversarial hearing" on the facts at issue. *Id.* at 1378.

Under the statute, and in the normal course of judicial proceedings, Western should have been held entitled to a *de novo* hearing, and hence discovery, with respect to the factual issues of Western's alleged (i) insolvency, (ii) dissipation of assets resulting from violations of law, and (iii) unsafe and unsound condition to transact business, unrestrained by the Board's incomplete administrative record.

(2) *The Legislative History*

The conclusion that the "on the merits" phrase in § 1464(d)(6)(A) requires a *de novo* hearing in the district court is strongly supported by the legislative history. This phrase was put into the statute by the Financial Institutions Supervisory Act of 1966, P.L. 89-695, 80 Stat. 1032-33. Under the previous statute, the Board was required to notify the association and give it an opportunity to be heard at a full administrative hearing, before it could appoint a receiver; and its action was subjected to a judicial hearing, at which "the review by the court

shall be upon the weight of the evidence." 68 Stat. 636 (1954).[4]

The 1966 statute expanded the power of the Board to appoint a receiver, but Congress, by providing for a hearing "upon the merits" in the district court, clearly intended to protect due process rights. The legislative history gives no support to the contention that Congress intended to make a drastic change by eliminating a prior hearing before the agency with judicial review on the weight of the evidence, and put in its place *no* administrative hearing at all and only review on an arbitrary and capricious basis, based solely on the record prepared *ex parte* by the agency. *See Telegraph Savings & Loan Ass'n, supra*, 564 F. Supp. at 869.

Examination of the development of the statutory language shows that Congress deliberately sought to *strengthen* the judicial remedy, in view of the elimination of a due process requirement before the Board. The earlier statute provided for "review," and on a broad basis. The present statute, enacted in 1966, does not refer to judicial "review," but, instead, explicitly pro-

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[4] The effect of the "weight of the evidence" language was to make inapplicable the limited review under the Administrative Procedure Act. *See* Hearing Before the House Comm. on Banking and Currency, 83d Cong., 2d Sess. 204 (1954) ("under the regular Administrative Procedure Act if they found any evidence, or substantial evidence, to support the administrative agency they would support hte administrative agency. This 'weight of the evidence' was put in to take it out of that group, where the court would really weigh the evidence") (W. Harrison).

Decisions under the earlier statute were in accord. *See, e.g., Beacon Federal Savings & Loan Ass'n v. FHLBB*, 162 F. Supp. 350, 354-355 (E.D. Wis. 1958), *app. dismissed*, 266 F.2d 246 (7th Cir.), *cert. denied*, 361 U.S. 823 (1959), where the court noted that a trial *de novo* was not required, in light of the full prior adversarial hearing before the agency. Under the amended statute, of course, there is neither a predeprivation nor a post-deprivation hearing before the agency, and accordingly trial *de novo* is required.

vides for a *de novo* hearing "upon the merits." [5] Thus, the 1966 amendment, by its terms, *increased* the role of the district courts in examining the propriety of the Board's decision to appoint a receiver.[6]

There is further support for this view in another provision in the 1966 amendment. Congress did limit judicial review with respect to actions of the Board charging a violation of law or regulation, preliminary to cancelling insurance coverage, by providing for judicial review solely in the Court of Appeals. *See* 12 U.S.C. §§ 1464(d)(2), (4), (7). However, an entirely different change was made in the provision with respect to receivership. Since the new statute made no provision for an administrative hearing, review was retained in the district court. And since the hearing in the district court provided the sole basis for determining whether the *ex parte* receivership was justi-

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[5] The reliance by the court below (*see* App. p. 10a) on *United States v. Carlo Bianchi & Co.*, 373 U.S. 709 (1963), is thus wholly unfounded. Here, Congress provided expressly that review was to be "upon the merits," and Congress provided for an original action in the district court. The opinion in *Carlo Bianchi* indicated that review could be confined to the administrative record "in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed." 373 U.S. at 715. Under the circumstances, in *Carlo Bianchi*, the Court declined to permit a party "to withhold evidence at the administrative level and then to introduce it in a judicial proceeding." *Id.* at 717. Here, of course, the Petitioners had no hearing before the agency, the administrative record was compiled *ex parte*, and the judicial proceeding is the first and only opportunity for the Petitioners to present any evidence. *Carlo Bianchi* has no applicability to such a case. Moreover, *Carlo Bianchi*, unlike the present case, concerned review of administrative action *after* a hearing before the agency. See also p. 17, *infra*.

[6] *See* Financial Institutions Supervisory Act of 1966—Hearings Before a Subcomm. of the Senate Comm. on Banking and Currency, 89th Cong., 2d Sess. 16 (1966) (FHLBB Chairman John E. Horne) ("the approach of this bill markedly increases the role of judicial review in the process of supervision of financial institutions").

fied, it was provided that the district court hearing should be "upon the merits"—which surely means *de novo*. As the court recognized in *Collie v. FHLBB*, 642 F. Supp. 1147, 1150 (E.D. Ill. 1986) (citations omitted):

> The legislative history . . . pointedly refers to APA review for the cease and desist and removal orders, but not for appointment of a receiver. . . . Instead, section [1464(d)(6)(A)] uses the unusual phrase, "upon the merits." Given this context, Congress cannot have intended review "upon the merits" to be the equivalent of an arbitrary or capricious standard.

C. The Lower Courts Denied Petitioners the *De Novo* Review to Which They Are Entitled Under the Administrative Procedure Act

Even under the Administrative Procedure Act ("APA") the Petitioners were entitled to *de novo* review. See 5 U.S.C. § 706. The most instructive analysis of § 706, and the various standards of review applicable under it, are found in this Court's decisions in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), and *Camp v. Pitts*, 411 U.S. 138 (1973). These two cases show that in a case such as this, where agency action is clearly adjudicatory in nature, and where, as here, inadequate factfinding procedures were utilized, *de novo* review is required under §706(2)(F).

The action of the Board in the present case was adjudicatory since it specifically affects the rights of a few persons and is based on individualized grounds. As Judge Higginbotham has held in *Exxon Corp. v. DOE*, 91 F.R.D. 26, 36, n.17 (N.D. Tex. 1981), "[a]n adjudicatory decision is one which 'is judicial rather than legislative in nature, has an accusatory flavor and may result in some form of disciplinary action and is concerned with issues of fact under stated law.'" (Citations omitted.) The Board's appointment of a receiver for the purpose of seizing control of Western falls squarely within this definition of "adjudicatory decision."

The lower courts erroneously decided that the arbitrary and capricious standard of review is proper under this Court's decision in *United States v. Carlo Bianchi & Co.*, 373 U.S. 709 (1963). While this Court in *Carlo Bianchi* did state that "where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no *de novo* proceeding may be held," *id.* at 715, the cases on which this Court relied were all cases in which there had been adequate adversary factfinding.[7]

D. Even Under an Arbitrary and Capricious Standard of Review, Petitioners Should Have Been Permitted to Make a Searching Inquiry Into the "Whole" Record

Assuming, *arguendo*, that the arbitrary and capricious standard of review is properly applicable, Petitioners were nevertheless entitled to discovery. This Court in *Overton Park* held that even though *de novo* review was not required, "the generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry" and "a thorough, probing and in-depth review." *See* 401 U.S. at 415.

In *Overton Park*, this Court also stated that inquiry must be made to determine whether the agency acted within the scope of its authority, *i.e.*, within the range of choices specified by Congress. Thus, in this case, a searching inquiry into the facts is necessary to determine whether the Board's decision to appoint a receiver was corrrect pursuant to the specific statutory prerequisites.

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[7] *See Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 432 (1930) (hearings extending over many months of which parties' counsel participated); *National Broadcasting Co. v. United States*, 319 U.S. 190, 195 (1943) (73 days of public hearings).

In addition, this Court in *Overton Park* stated that the "review is to be based on the full administrative record that was before the [agency]." *Id.* at 420. As noted by this Court, however,

> [S]ince the bare record may not disclose the factors that were considered or the [agency's] construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the [agency] acted within the scope of [its] authority and if the [agency's] action was justifiable under the applicable standard.

Id.

Overton Park thus holds that the district court should have gone beyond the so-called administrative record, prepared and presented *ex parte* by the Board, in order to make an informed determination as to which facts were and were not considered by the Board. As Judge Higginbotham recognized in *Exxon*, "the 'whole' record is not necessarily those documents that the *agency* has compiled and submitted as 'the' administrative record." 91 F.R.D. at 32. (Emphasis in original.) Rather, the "whole" administrative record "consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." *Id.* at 33. Moreover, it is the *court*, and not the *agency*, that determines whether the complete record has been submitted. As Judge Higginbotham stated, "[i]t would be a hypocritical scheme indeed to hand to a decision-maker the power to control review of its decision." *Id.* at 39. *See Tenneco Oil Co. v. DOE*, 475 F. Supp. 299, 317 (D. Del. 1979) ("DOE may not unilaterally determine what shall constitute the administrative record and thereby limit the scope of this Court's inquiry.").

CONCLUSION

For the reasons set forth above, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
— FOR THE FIFTH CIRCUIT

No. 86-1750

JARRETT E. WOODS, JR., *et al.*,
Plaintiffs-Appellants,

versus

FEDERAL HOME LOAN BANK BOARD, *et al.*,
Defendants-Appellees.

87-1272

JARRETT E. WOODS, JR., *et al.*,
Plaintiffs-Appellants

v.

FEDERAL HOME LOAN BANK BOARD, *et al.*,
Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Texas

(August 27, 1987)

Before CLARK, Chief Judge, BROWN, and JOHNSON, Circuit Judges.

CLARK, Chief Judge:

This consolidated appeal involves the appointment by the Federal Home Loan Bank Board (Bank Board) of the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver for Western Savings Association (Western) on September 12, 1986. The Bank Board determined that Western (1) was insolvent, (2) had suffered substantial dissipation of assets due to violations of regulations and unsafe or unsound practices by its management, and (3) was in an unsafe and unsound condition to transact business. *See* Home Owners' Loan Act, 12 U.S.C. § 1464(d)(6)(A)(i), (ii), and (iii). Plaintiffs filed suit in the district court, seeking removal of the receiver and interim injunctive relief to restrain the receiver from transferring any of Western's assets. The district court immediately denied plaintiff's request for an injunction. After review of the administrative record and consideration of the parties' arguments, the district court granted the Bank Board's motion for summary judgment, finding no genuine issue of material fact as to whether the decision to appoint the receiver was supported by the administrative record, was not arbitrary or capricious, and was based on three enumerated statutory grounds. Plaintiffs appealed both rulings, and this court consolidated the appeals.

The district court correctly applied the arbitrary or capricious standard in reviewing the Bank Board's decision to appoint a receiver for Western. That court also correctly concluded that no genuine issue of material fact existed as to whether the Bank Board's determination to appoint a receiver was supported by the record. The review procedure provided by Congress in § 1464(d)(6)(A) is constitutional, and plaintiffs were not denied due process. We affirm.

I. Background

A. *Facts*

Jarrett E. Woods, Jr. acquired Western on August 30, 1982. At that time, Western was a relatively small savings and loan association with reported assets of about $34 million. After Woods' acquisition, he made a substantial change in the strategy and business operation of the institution. Woods pursued an aggressive growth policy, relying on brokered deposits and so-called "jumbo" deposits of $100,000 or more. Investments shifted from single family, home mortgage loans to acquisition, development and construction loans, commercial real estate loans, and other commercial ventures. By June 30, 1986, Western reported assets of more than $1.9 billion.

Between October 1982 and September 1986 the Bank Board conducted a series of examinations of Western. In February 1984, Bank Board examiners filed a supervisory "adverse rating report" identifying Western's rapid growth and Woods' higher-risk commercial lending practices. The examiners found serious underwriting deficiencies in highly speculative ventures which included loans in excess of a property's purchase price. The examiners also found improperly documented large-scale loans to officers and shareholders of other Texas savings associations, as well as improperly documented participation by Western in loans granted by these other associations.

This initial examination led to a special examination in March 1984, which focused on Western's portfolio of real estate loans. This examination reviewed a sample of fifteen real estate loans of $1,000,00 or more and found each loan was made by Western without borrower equity. A majority of these loans were "wrapped around" existing loans, and, as a result, Western's liens were subordinate to the liens of other lenders. At least one loan was identified as a "flip"—where property was resold

at an inflated price the day it was purchased. This did not appear to the examiners to be an arm's length transtion. Problems with lack of documentation were abundant.

A June 1984 examination of Western's commercial loans and financial accounting practices further revealed improperly substantiated credit information. For example, Western had made loans without obtaining current financial statements of the borrowers and failed to determine the value of the collateral securing the loans. The examiners also found that Western had inflated its reported net worth by more than $18 million through improper accounting.

The results of these examinations were furnished to both Western and the Bank Board. On June 22, 1984, the Bank Board adopted a resolution stating that Western "has engaged in unsafe and unsound practices in violation of the [National Housing Act, 12 U.S.C. § 1730(e)(1)]" and who issued a Temporary Cease and Desist Order along with a notice of Western's right to an administrative hearing to be conducted in accordance with the adjudicative provisions of the Administrative Procedure Act (APA) 5 U.S.C. §§ 554-57. Western waived its rights to such a hearing and on July 27, 1984 consented to an Order to Cease and Desist. The order required, *inter alia*, that Western obtain proper appraisal reports as a condition for loans secured by real property, comply with regulations governing loans to one borrower, and conform its accounting practices to Bank Board requirements.

Further examinations by the Bank Board disclosed, however, that Western did not alter its practices. They noted Western's lack of compliance with the cease and desist order's requirements as well as additional unsound practices. A January 1985 examination found unacceptable loan concentrations, losses of more than 11 million on problem loans, continuing irregularities in

accounting and appraisals, purchases of new participations in the loans of other associations, new violations of the limitation on loans to one borrower, and other questionable or prohibited practices. A February 1986 examination found that Western's loans totalled well over $1 billion. The examiners also found that 1985 losses had reduced Western's reported net worth to only 1.7 percent of total assets, which was below the legal minimum. *See* 12 C.F.R. § 563.13(b). This examination also disclosed new loans without borrower equity, new loans without proper appraisals, and additional violations of the "loans to one borrower" limitations. An interim report in March 1986 questioned the high percentage of loans funded by jumbo and brokered deposits, extensive transactions between Western and a corporation whose board of directors included both Woods and Western's assistant secretary, and four more loans made in violation of the one-borrower limitations.

The examiners' findings and recommendations were the product of a long period of supervision. This process included numerous meetings and informal conversations between the examiners and Western's management and board of directors to discuss the Bank Board's concerns; analysis of Western's loan files and its monthly, quarterly, and annual financial statements; appraisals of the property securing the loans by outside experts; and a report prepared by Western's auditors. At all times it was or should have been apparent to Western that the examiners' efforts were producing a voluminous administrative record of the entire investigation.

Based on this record the Bank Board determined first that, despite a reported net worth of more than $65 million as of June 30, 1986, Western was actually insolvent by at least $56 million based on real estate and other losses of over $120 million not reflected in Western's books. The Bank Board found second that these losses were the result of violations of laws and regulations and

unsafe or unsound practices. Based on Western's insolvency, the composition of its loan portfolio, and the apparent refusal of Western's management to utilize sound lending practices—as evidenced by Western's consistent actions and its non-compliance with the cease and desist order—the Bank Board concluded third that Western was in an unsafe and unsound condition to transact business. Pursuant to finding the existence of the above statutory grounds, *see* 12 U.S.C. § 1464(d)(6)(A), the Bank Board appointed the FSLIC as receiver on September 16, 1987. The FSLIC immediately transferred Western's assets to a newly created federal savings and loan institution—Western Federal Savings and Loan Association.

B. *Proceedings in District Court*

Plaintiffs Woods, Western, Western's parent corporation, and a Western vice-president originally filed this action in June 1986 in an attempt to enjoin the appointment of a receiver.[1] The district court denied the request for an injunction. After the appointment of the receiver, plaintiffs amended their complaint to seek removal of the receiver—an action authorized under § 1464(d)(6)(A)—as well as a temporary restraining order to prohibit the FSLIC from taking possession of Western. After the FSLIC took possession, plaintiffs sought to temporarily restrain the FSLIC from transferring any of Western's assets and liabilities during the pendency of proceedings seeking to remove the receiver. The district court denied this request for interim relief, reading

[1] Plaintiffs in district court also challenged the validity of two new Bank Board regulations, 12 C.F.R. §§ 561.6c and 563.17-2, on statutory and constitutional grounds. Plaintiffs claimed that Bank Board relied on the new regulations in determining Western's insolvency. The Bank Board claimed that it did not use the new regulations in appointing the receiver, and the district court declined to address the issue of the regulations' validity. Plaintiffs concede that the issue of the validity of these regulations is not before this court.

§ 1464(d)(6)(C)[2] to preclude an action by an association to remove or restrain a receiver, other than in the manner provided in part (A).

Defendants moved for summary judgment. The court reviewed the administrative record and considered Western's opposition to the Bank Board's determination. The court concluded that the record supported the Bank Board's finding that three of the statutory grounds for the appointment of a receiver existed. The court reviewed the Bank Board's decision to appoint a receiver under the arbitrary and capricious standard of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), and, based on the record before the Bank Board, found that Western's opposition to the Bank Board's action did not raise a genuine issue of material fact. The court also found it significant that Western did not dispute many of the Bank Board's findings as to numerous unsafe and unsound practices. Accordingly, it dismissed plaintiffs' action seeking to remove the receiver.

Plaintiffs appeal both the denial of injunctive relief and the district court's summary judgment in favor of defendants. Plaintiffs concede that, should this court uphold the district court's summary judgment that the appointment of a receiver was proper, their appeal from the denial of injunctive relief will become moot. Accordingly, we proceed first to addres the merits of plaintiffs' action to remove the FSLIC as receiver under § 1464(d)(6)(A).

II. Discussion

The Bank Board is an independent federal agency established by Congress. 12 U.S.C. § 1437. It is charged with

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[2] Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

5 U.S.C. § 1464(d)(6)(C).

the administration of the Home Owners' Loan Act of 1933, 12 U.S. C. §§ 1461-1470, and the National Housing Act, 12 U.S.C. §§ 1724-1730. The statutory authority pursuant to which the Bank Board derives its power to appoint a receiver and under which the plaintiffs have sought an order directing removal of that receiver reads as follows:

> The *grounds for the appointment of a* conservator or *receiver* for an association *shall be* one or more of the following: (i) *insolvency in that the assets of the association are less than its obligations to its creditors and others, including its members; (ii) substantial dissipation of assets or earnings due to any violation or violations of law, rules, or regulations, or to any unsafe or unsound practice or practices; (iii) an unsafe or unsound condition to transact business;* (iv) willful violation of a cease-and-desist order which has become final; (v) concealment of books, papers, records, or assets of the association or refusal to submit books, papers, records, or affairs of the association for inspection to any examiner or to any lawful agent of the Board. The Board shall have exclusive power and jurisdiction to appoint a conservator or receiver. *If, in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein provided exists, the Board is authorized to appoint ex parte and without notice a conservator or receiver for the association. In the event of such appointment, the association may, within thirty days thereafter, bring an action in the United States district court* for the judicial district in which the home office of such association is located, or in the United States District Court for the District of Columbia, *for an order requiring the Board to remove such conservator or receiver, and the court shall upon the merits dimiss such action or direct the Board to remove such conservator or*

> *receiver.* Upon the commencement of such an action, the court having jurisdiction of any other action or proceeding authorized under this subsection shall stay such action or proceeding during the pendency of the action for removal of the conservator or receiver.

12 U.S.C. § 1464(d)(6)(A) (emphasis added). *See also* 12 U.S.C. § 1729(c)(1)(B) (extending Bank Board's authority to state-chartered institutions). This court's jurisdiction to review the Bank Board's decision to appoint a receiver "is limited to a determination whether one of the statutory grounds enumerated in § 1464(d)(6)(A) existed at the time of the appointment of the [receiver]." Alliance Federal Savings and Loan Association v. Federal Home Loan Bank Board (*FHLBB*), 782 F.2d 490, 493, *modified on other grounds*, 790 F.2d 34 (5th Cir. 1986) (agreeing with Biscayne Federal Savings & Loan Association v. FHLBB, 720 F.2d 1499, 1503-04 (11th Cir. 1983), *cert. denied*, 467 U.S. 1215, 104 S.Ct. 2656 (1984)).

A. *Standard of Review*

We noted in *Alliance* that § 1464(d)(6)(A) does not expressly define the scope of a district court's judicial review in determining "upon the merits" whether to "dismiss such action or direct the Board to remove such conservator or receiver for the association." The district court in this case based its consideration of whether the Bank Board properly appointed a receiver upon the administrative record reviewed under the "arbitrary and capricious" standard of the APA.[3] Plaintiffs respond that

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[3] The relevant portion of the APA provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and deter-

they are entitled to *de novo* judicial review in the district court, as required by the statute itself, the APA, and the Constitution.

This court in *Alliance* did not directly address the issue of whether an aggrieved association is entitled to have its removal action reviewed *de novo* under § 1464(d)(6)(A).[4] Plaintiffs contend that the wording of the statute—"the court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver"—mandates *de novo* review. The Supreme Court has advised, however, that "in cases where Congress has simply provided for review, without setting forth the standards to be used or procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no *de novo* proceeding may be held." United States v. Carlos Bianchi and Co., 373 U.S. 709, 715, 83 S.Ct. 1409, 1413 (1963) (citing Tagg Bros. & Moorehead v. United States, 280 U.S. 240, 50 S.Ct. 220 (1930); National Broadcasting Co. v. United States, 319 U.S. 190, 227, 63 S.Ct. 997, 1014 (1943)). We agree with the Eighth Circuit that § 1464(d)(6)(A) is such a statute which does not provide for *de novo* review. *See*

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mine the meaning or applicability of the terms of an agency action. The reviewing court shall—

* * * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .

5 U.S.C. § 706(2)(A).

[4] This court noted in the initial *Alliance* opinion that the association did not request a trial *de novo*. 782 F.2d at 496. On rehearing upon petition of the Bank Board, the court redrafted the paragraph containing this statement and deleted any reference to the availability of a *de novo* proceeding to challenge the appointment of a receiver, 790 F.2d at 34-35, and thus implicitly left open the issue of scope of review.

Guaranty Savings & Loan Association v. FHLBB, 794 F.2d 1339, 1342 (8th Cir. 1986). The Eighth Circuit observed that the statute's provision that "the court shall *upon the merits* dismiss such action" did not define the scope of review but rather directed the district court to affirm or reverse the appointment of a receiver based on the existence of statutory grounds for appointment—not on procedural or policy grounds.

Moreover, we are persuaded that our interpretation of § 1464(d)(6)(A) is consistent with congressional intent to "vest[] a vast amount of control and authority in the [Bank Board] to regulate savings and loan associations." *Alliance*, 782 F.2d at 493 (citing Fidelity Savings & Loan Association v. de la Cuesta, 458 U.S. 141, 159-67, 102 S.Ct. 3014, 3025-30 (1982)). Section 1464(d)(6)(A) itself manifests strong congressional intent for swift, effective regulatory action. The Bank Board is expressly granted the "exclusive power and jurisdiction" to appoint a receiver "ex parte and without notice," if the Bank Board finds that any of the enumerated grounds for appointment exists. This authority extends to FSLIC-insured state chartered institutions. *See* 12 U.S.C. § 1729(c)(1)(B).

Congress has granted the FSLIC extensive powers to regulate and supervise insured savings and loan institutions. *See* 12 U.S.C. §§ 1726-1730. Pursuant to its congressional mandate, the Bank Board has promulgated a comprehensive regulatory scheme to protect the FSLIC's financial interests. *See* 12 C.F.R. Parts 500-591. The reasons for such extensive regulation and the broad congressional mandate are obvious: insured institutions derive their principal financial integrity from the federal insurance scheme; a major portion of the risk of financial failure falls squarely upon the FSLIC as insurer of every depositor's account. We previously observed that "Congress wanted the FSLIC to be able to act quickly and decisively in reorganizing, operating, or dissolving a

failed institution, and intended that the FSLIC's ability to accomplish these goals not be interferred with by other judicial or regulatory authorities." North Mississippi Savings & Loan Association v. Hudspeth, 756 F.2d 1096, 1101 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 790 (1986) (third-party contract dispute with FSLIC as receiver for failed association).

Plaintiffs cite several district court cases which they construe as interpreting § 1464(d)(6)(A) "to require a full adversarial and evidentiary hearing." *See, e.g.*, Haralson v. FHLBB, 655 F.Supp. 1550, 1557-60 (D.C.D. 1987) (§ 1464(d)(6)(A) requires post-deprivation hearing at which Bank Board has burden to come forward with evidence sufficient to support a finding of a violation); Collie v. FHLBB, 642 F.Supp. 1147, 1149-52 (N.D. Ill. 1986) (rejects APA's arbitrary and capricious standard, but nonetheless holds that if the association had a "meaningful opportunity" to make a case and if there was a "reasonable factual basis" for the Board action, no court trial is required); Telegraph Savings and Loan Association v. FSLIC, 564 F.Supp. 862, 869-70 (N.D. Ill. 1981) (full adversarial hearing "on the merits" required as to whether Board had statutory authority to appoint receiver), *aff'd on other grounds*, 703 F.2d 1019 (7th Cir.), *cert. denied*, 464 U.S. 992, 104 S.Ct. 484 (1983); Fidelity Savings and Loan Association v. FHLBB, 540 F.Supp. 1374, 1377 (N.D. Cal. 1982) ("If it means nothing more, the term 'on the merits' reveals that a proceeding under this statute is more in the nature of a *de novo* review than an appellate review."), *rev'd on other grounds*, 689 F.2d 803 (9th Cir. 1982), *cert. denied*, 461 U.S. 914, 103 S.Ct. 1893 (1983). These decisions, while not controlling, are not in conflict with our reading of § 1464(d)(6)(A). Only the *Collie* and *Telegraph* courts actually applied a standard of review and reached a decision on the merits, and the *Collie* court granted summary judgment after finding that the

FHLBB afforded the aggrieved association a meaningful hearing and had a reasonable factual basis for its action. 642 F.Supp. at 1154. No federal appellate court has ruled that a *de novo* hearing is required. Indeed, the only other court of appeals to address the issue has squarely held that the Bank Board's decision is to be reviewed on the basis of the administrative record in accordance with the APA standard. *See Guaranty Savings*, 794 F.2d at 1342. Accord San Marino Savings and Loan Association v. FHLBB, 605 F.Supp. 502, 508 (C.D. Cal. 1984) (appropriate standard of review under § 1464 (d) (6) (A) is arbitrary and capricious test); Washington Federal Savings and Loan Association v. FHLBB, 526 F.Supp. 343, 350, 353-54 (N.D. Ohio 1981) (scope of judicial review coincides with § 706(2) (A) of the APA; court considers whether decision to appoint receiver was based on relevant factors and whether there has been clear error of judgment).

Plaintiffs contend that they are entitled to a *de novo* hearing under § 706(2) (F) of the APA. This subsection reads as follows:

> The reviewing court shall—
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
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> * * * *
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706(2) (F). Section 706(2) (F) has been interpreted by the Supreme Court as authorizing *de novo* review "when the action is adjudicatory in nature and the agency fact finding procedures are inadequate" and "when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415, 91 S.Ct. 814, 823 (1971) (Secretary of Transportation's decision under the National Environmental Protection Act to approve construction of a high-

way through a park was nonadjudicatory in nature and not subject to § 706(2)(F)). *See* also Camp v. Pitts, 411 U.S. 138, 141-42, 93 S.Ct. 1241, 1243-44 (fact-finding procedures used by Comptroller of the Currency were not deficient); Porter v. Califano, 592 F.2d 770 (5th Cir. 1979) (§ 706(2)(F) authorizes a district court to conduct *de novo* review of agency action suspending employee for criticizing supervisors where agency factfinding procedures were inadequate).

Plaintiffs urge that the Bank Board's factfinding procedures were inadequate and that *de novo* review is thus appropriate.[5] We do not agree. The Supreme Court has limited *de novo* review of agency actions under § 706(2)(F) to situations "where there are inadequate factfinding procedures in an adjudicatory proceeding, or where judicial proceedings are brought to enforce certain administrative actions." *Camp*, 411 U.S. at 142, 93 S.Ct. at 1244 (citing *Overton Park*, 401 U.S. at 415, 91 S.Ct. at 823). Section 706(2)(F) does not embrace the situation at hand. Congress did not require that the Bank Board hold an adjudicatory hearing to determine whether a statutory ground for appointment of a receiver existed. Instead, Congress has entrusted the Bank Board with a broad regulatory mandate, and the Bank Board has responded with a thorough, extensive regulatory scheme as Congress intended. The permission granted to the association in § 1464(d)(6)(A) to bring an action in a district court is limited to seeking an order to remove the receiver. Since *Alliance* commits us to view the action as of the time the receiver was appointed, the merits of that judicial review are properly limited to the administrative record.

The Bank Board's appointment of a receiver is similar to the Comptroller of the Currency's denial of an appli-

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[5] The Eighth Circuit recognized the possibility of this argument in *Guaranty Savings*, 794 F.2d at 1342 n.5. Because the association there did not assert that either exception applied to its case, the court declined to address the issue. *Id.*

cation for a new bank in *Camp*. Both agencies are granted broad *ex parte* authority to make the pertinent determinations. In *Camp*, the Comptroller was statutorily authorized to deny the plaintiffs' application for authorization to organize a new bank without a formal hearing. Review of this agency action was to be made in the district court under the arbitrary and capricious test and not in a *de novo* hearing. The Supreme Court stated "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Id.* at 142, 93 S.Ct. at 1244. On the authority of *Camp*, *Alliance*, and *Guaranty Savings*, we reject plaintiffs' claim that § 706(2)(F) entitles them to a *de novo* hearing in the district court.

In sum, a practical analysis of § 1464(d)(6)(A) establishes that Congress did not intend for the district court to review the Bank Board's decision *de novo*, but rather that the decision be reviewed on the basis of the administrative record in accordance with the APA's "arbitrary and capricious" standard of review. Under § 706(2)(A), plaintiffs have the burden to show that the Bank Board's decision to appoint a receiver was arbitrary and capricious. *Guranty Savings*, 794 F.2d at 1342. The Bank Board's decision is entitled to a "presumption of regularity." *Overton Park*, 401 U.S. at 415, 91 S.Ct. at 823. A court's review of the Bank Board's decision is "confined to the administrative record." *Carlos Bianchi*, 373 U.S. at 715, 83 S.Ct. at 1413; *Camp*, 411 U.S. at 142, 93 S.Ct. at 1244 (1973). The arbitrary and capricious standard of review requires a reviewing court to "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Overton Park*, 401 U.S. at 416, 91 S.Ct. at 823-24.

B. *Review of the Bank Board's Decision*

We agree with the district court that the administrative record in this case amply supports the Bank Board's conclusion that Western was insolvent, had suffered a substantial dissipation assets as a result of violations of rules or regulations and unsafe or unsound practices, and was in an unsafe or unsound condition to transact business.

The determination that Western was insolvent to the extent of $56 million was based on the relation of reported net worth to appraised loan losses. These losses were calculated in seventeen independent appraisals conducted in accordance with 12 C.F.R. §§ 563.17-1 and 571.7. Plaintiffs submitted an audit by Arthur Young & Company which showed Western to have a net worth in excess of $48 million as of December 31, 1985. The Arthur Young audit, however, reported Western's financial condition more than eight months before the Bank Board appointed the FSLIC as receiver. This audit report did not reflect the fact that Western reported an increase in problem loans of 30 percent in the first six months of 1986. Nor did this audit report consider the results of supervisory appraisals by the Bank Board reflecting 1986 activity. Finally, the Arthur Young audit does not purport to be based on any appraisals of the value of collateral supporting Western's loans other than the values assigned by Western in its own previously issued financial statements.

The Arthur Young audit report was considered by the Bank Board. It is included in the administrative record which was before the district court. It presents an independent auditor's opinion about the financial condition of Western, but as of an earlier time and based on Western's own reports. The district court could determine that the Bank Board did not act arbitrarily or capriciously by giving greater weight to the results of independent ap-

praisals and more current examiners' findings. The determination of insolvency is amply supported in the record.

The Bank Board's determination that Western had suffered a substantial dissipation of assets due to violations of rules or regulations and unsafe or unsound practices is also supported by the administrative record. Western repeatedly made loans without proper appraisals of collateral, which violated 12 C.F.R. § 563.17-1(c)(1)(iii); made loans in excess of the limitations on loans to one borrower in violation of 12 C.F.R. § 563.9-3(b)(2)(i); and committed violations of the July 1984 cease and desist order. The Bank Board also found that Western concentrated its loan portfolio in high-risk acquisition, development and construction loans, and that it funded these loans through volatile brokered and jumbo deposits. Western improperly classified many investments in violation of 12 C.F.R. §§ 563.17-1(c), 563.23-3, and 563c.12(b); failed to collect sufficient financial information on the ability of borrowers and guarantors to repay loans in violation of 12 C.F.R. § 563.17-1(c)(1)(iv); exceeded limits on liability growth contrary to 12 C.F.R. § 563.13-1(a)(1); conducted improper financial option transactions in violation of 12 C.F.R. § 563.7-5; and routinely undertook transactions with affiliated entities which were prohibited by 12 C.F.R. §§ 563.43 and 571.7.

The record is not limited to a single episode or period of improper performance. Western continued its imprudent practice over a four-year span despite numerous regulatory warnings, supervisory actions, and the cease and desist order. The same evidence supporting the determination that Western had suffered a substantial dissipation of assets, resulting in a negative net worth in excess of $56 million, also showed that Western was in an unsafe and unsound condition to transact business.

All three determinations find ample support in the administrative record. Despite Western's contentions that

in some instances the criticisms in the examinations were inaccurate, abundant other information in the record that was before the Bank Board clearly supports the district court's conclusion that no genuine fact dispute existed over whether the Bank Board acted arbitrarily or capriciously in deciding to appoint a receiver for Western.

C. *Due Process*

Plaintiffs contend the APA's arbitrary and capricious standard of review which was applied in the district court denied them due process of law. They contend that the Constitution requires a post-deprivation evidentiary and adjudicatory hearing since they did not receive notice or any opportunity to be heard before the Bank Board seized all of Western's assets.

The short answer is that Congress deliberately entrusted the Bank Board and the FSLIC with broad authority to regulate insured institutions in order to protect the FSLIC from the risks of business failures. This is made plain by the fact that there is no requirement in § 1464(d)(6)(A) for an aggrieved association to be afforded a formal opportunity to be heard before the Bank Board. The Supreme Court has held that there is no constitutional requirement that an association be given an adjudicatory hearing prior to the Bank Board's appointment of a receiver. Fahey v. Mallonee, 332 U.S. 245, 67 S.Ct. 1552 (1947). Under this authority, Congress expressly empowered the Bank Board to appoint a receiver "ex parte and without notice." In many instances a pre-seizure hearing and notice of planned action could thwart the Bank Board's need to act decisively to secure remaining assets.

Plaintiffs contend that the Constitution still requires a meannigful hearing preferably before a taking, but,

if not then, at least after the seizure of the property. If Congress did not provide for a meaningful hearing in § 1464(d)(6)(A), plaintiffs continue, then the statute itself infringes on their constitutional due process rights. Plaintiffs rely for the most part on language from a number of Supreme Court decisions which they say establish that some kind of hearing is required before a final deprivation of property. *See, e.g.*, Fuentis v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994 (1972) ("the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner' ") (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965)). Plaintiffs claim a constitutional entitlement to either a pre- or post-deprivation adjudicatory hearing to contest the Bank Board's taking of Western's assets, which would include notice of allegations and substance of supporting evidence and an opportunity to submit a written response, meet with examiners, and present statements from rebuttal witnesses. *See* Brock v. Roadway Express, Inc., 107 S.Ct. 1740 (1987). Plaintiffs say this is necessary to minimize the chance of a mistaken deprivation of property.

Procedural due process is a flexible concept and "calls for such procedural protections as the situation demands." Morrisey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600 (1972). "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748 (1961). What due process may require "in dealing with one set of interests which it protects may not be required in dealing with another set of interests." Arnett v. Kennedy, 416 U.S. 134, 155, 94 S.Ct. 1633, 1645 (1974).

Normally, courts examine the adequacy of pre-deprivation procedures afforded an aggrieved party in light of the post-deprivation procedures that are available. *See, e.g., Brock*, 107 S.Ct. 1740; Cleveland Board of Education v. Loudermill, 470 U.S. 532, 545, 105 S.Ct. 1487, 1495 (1985). The exceptionally strong government interest in administering FSLIC insurance and the unique statutory position occupied by the Bank Board which requires no pre-deprivation hearing combine to present us with the reverse of the situation found in most procedural due process cases.

Although plaintiffs concede the Bank Board's authority to appoint a receiver *ex parte* and without notice, they assert that the absence of pre-deprivation process heightens the need for post-deprivation procedures in this case. We agree. We must examine the constitutional challenge to the statutory scheme on its face and with regard to the particular procedures employed in this case by balancing the strong government interests in imposing an *ex parte* receivership, the nature of the private interests of those affected by the government action, the risk of erroneous deprivations through the challenged Bank Board's procedures, and the nature and value of the pre-deprivation proceedings. *Cf. Brock*, 107 S.Ct. at 1747 (Marshall, J., for plurality) (citing Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903 (1976)); *id.* at 1752 (White, J., concurring in part and dissenting in part) (citing *Loudermill*, 470 U.S. at 545, 105 S.Ct. at 1495).

The government interest in this case is obvious. Savings and loan associations derive the principal part of their fiscal strength from FSLIC insurance. Without this insurance, associations would be unable to secure the guarantee of the government for individual deposits. With the deposits this security attracts, institutions make investments, acquire property, and extend loans. The risk of failure with respect to these transactions falls

most heavily upon the FSLIC as insurer. Congress thus granted the Bank and the FSLIC the strongest powers constitutionally possible in order to preserve depositor confidence in the savings institutions of this country and to minimize loss and depletion of FSLIC insurance funds.

Woods' and Western's private interests are obviously subordinate to those of the government. When Woods acquired Western, he was aware of the extensive regulatory system and the possibility of continuous, in-depth supervision by Bank Board examiners. He had to know this supervision would be acute in the case of an institution which increased its assets from approximately $34 million to almost $2 billion in a period of just over four-years. While owners of a FSLIC-insured savings and loan association clearly have the constitutional right to be free from unlawful deprivations of their property by the national government, these private interests do not stand on the same footing as the interests of the property owner in *Fuentis*, the school district employees in *Loudermill*, the federal government employee in *Arnett*, or the interstate trucking company in *Railway Express*. We are dealing here with entirely different interests. While plaintiffs' interests cannot be destroyed by arbitrary or capricious actions, the process that is due is to be assayed by considerations which account for all interests in their context.

The method provided—a court review of agency action under the arbitrary or capricious standard—is adequate to assure against the risk of mistaken deprivations. If the record before the Bank Board is properly compiled and demonstrates it properly followed its Congressional mandate and its own regulations, and gave fair and reasoned consideration to all relevant factors before determining that one or more of the statutory grounds for appointment of a receiver existed, its decision will survive review in the district court. That congressionally

provided standard of review is all the process an FSLIC-insured savings and loan association and its owners are constitutionally due in this case.

Plaintiffs urge that the Supreme Court's *Fuentis* decision directly controls the facts of this case. Plaintiffs quote the following language:

> The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.'

Fuentis, 407 U.S. at 81, 93 S.Ct. at 1994 (quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-172, 71 S.Ct. 624, 647 (Frankfurter, J., concurring)). The Supreme Court in *Fuentis* struck down two states' prejudgment replevin statutes as a deprivation of property without due process insofar as they deprived an impecunious owner of the opportunity to be heard prior to the taking of his property. *Fuentis* is distinguishable on a number of grounds. First, *Fuentis* directly involved the necessity of pre-deprivation process; here, it is conceded that a formal pre-deprivation hearing is not necessary. Defendants' challenge is directed only to post-deprivation procedures. Second, the interests of an FSLIC-insured savings and loan association and its

owners are not comparable to the interests of Mrs. Fuentis in retaining her gas stove against the interests of the creditor who, under state law, merely had to fill out a form to take the property without a pre-seizure hearing.

Finally, invocation of the words of Justice Frankfurter which addressed a secret, one-sided determination where plaintiff was given no notice and no opportunity to respond is inappropriate here. Plaintiffs claim that the Bank Board's factfinding procedures were "wholly inadequate," that Western was denied the opportunity to participate in the process of creating the administrative record, that the record was unilaterally and secretly compiled, and that it does not contain their contribution to the examinations or their responses to specific charges. Plaintiffs attempt to create the impression of an unfair, high-handed takeover that Western did not know about. This simply was not the case. To the extent that due process requires a meaningful opportunity to be heard and meaningful notice in this case, plaintiffs received just that throughout the four-year period of continuous, open supervision by Bank Board examiners. The administrative record shows thorough, persistent notice to and opportunity for criticism and input on the part of Western. Nothing in the administrative record and no affidavit before the district court in response to the motion for summary judgment indicates that any factual matter, defense or response which Western offered or presented was refused by the Bank Board or barred from the record.

Plaintiffs cannot complain that Western was seized by surprise or that they were deprived of their property without notice. Not only was there a formal cease and desist proceeding, but also these same plaintiffs filed the initial action in this case in June 1986, some three months before the Bank Board appointed the receiver. Plaintiffs clearly were aware of the gravity of the situation at that

time. In addition, we cannot ignore the fact that the investigation of Western began almost immediately after Woods acquired the institution. Woods rapidly increased Western's assets through high-risk ventures and thus provoked the painstakingly close scrutiny. The Bank Board's action was not an overnight or surreptitious takeover, but the ultimate result of a culmination of provocations resulting from Western's continuing unwillingness to conform to required practices. The Bank Board's action was preceded by almost constant notices that Western's actions were under scrutiny and that Western's best possible explanations or justifications were required.

Plaintiffs had numerous informal, personal meetings with examiners and supervisors over the four-year period which afforded them opportunities to provide information or explanations of Western's accounting practices, its questionable loans, or its financial records. The Bank Board reviewed Western's loan file, its own appraisals of its property and Western's monthly, quarterly and annual financial statements. Western received copies of the Bank Board's supervisory appraisals even before the receiver was appointed. In connection with the July 1984 cease and desist proceedings, plaintiffs were afforded the opportunity to have a formal administrative hearing, but waived it.

Western also received formal notice of the Bank Board's determination after the receivership appointment as contemplated by Congress. At that time, Western received notice of the substance of the pertinent evidence supporting each determination as well as the entire administrative record containing all materials on which the Bank Board relied. Western had the opportunity to rebut the Bank Board's evidence and conclusions in district court. Western availed itself of this opportunity by submitting a multi-volume exhibit and affidavits in opposition to the Bank Board's position. The record com-

piled in the district court clearly establishes that Western was not precluded from meaningful participation in the administrative decision-making process.

The record contains Western's own audit conducted by Arthur Young. It includes Western's response to examiners' findings a year and one-half before the receivership appointment, which essentially took the wholly refuted position that Western's practices conformed to the Bank Board's rules and regulations as well as the cease and desist order. It contains Western's contentions of solvency, its position that its loan and other transactions were legitimate and prudent, and its view that the $10 million carried value on its books for another insolvent savings association was appropriate.

Plaintiffs' general assertions that Western was denied participation in the administrative proceedings and that relevant materials, including its responses to some of the specific charges, were not included in the administrative record do not establish that the Bank Board intentionally excluded relevant evidence which would have supported plaintiffs' position. The record in the district court manifests the contrary. Western's affidavits raised the conflict as to solvency which the Arthur Young auditor's affidavit created.. Criticism of appraisal work regarding a significant tract of land which secured one large loan was the subject of another counter affidavit. The remainder of the record before the district court, which is only generally attacked in the briefs of Western, firmly supports the Bank Board's findings and is more than ample to persuade us that the district court correctly found the Bank Board's action was not arbitrary or capricious.

D. *The Propriety of Summary Judgment*

Plaintiffs had the opportunity in district court to rebut the Bank Board's factual assertions or show that a genuine issue of material fact existed which indicated the

decision to appoint a receiver was arbitrary and capricious. The arguments raised and the evidence offered by plaintiffs failed to do this. Their challenges did not raise a factual issue as to whether any one of the Bank Board's three key determinations was unsupported in the administrative record.

Plaintiffs, for example, questioned the objectivity and qualifications of some of the appraisers and the methodology employed in conducting a number of the appraisals. In a responsive brief to the motion for summary judgment, Western's counsel asserted that virtually all of Western's formal management responses and other significant correspondence is absent from the record. However, no proper summary judgment affidavit brought to the attention of the district court what responses or letters were omitted. Plaintiffs never did challenge the classification of or even attempt to explain many problem loans. The district court expressly noted that plaintiffs left unchallenged many transactions and practices disclosed by the record which were sufficient in themselves to support the Bank Board's key determinations. The district court properly declined to allow a battle of appraisers. The issues were correctly limited to an examination of what was or should have been before the Bank Board when it acted.

Plaintiffs complain that they were denied adequate discovery before the district court granted summary judgment. They assert that genuine fact issues existed as to insolvency, substantial dissipation of assets, Western's unsafe and unsound condition, and the completeness of the administrative record and that the need for discovery was made known to the district court by affidavit.

Rule 56(e) of the Federal Rules of Civil Procedure provides:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as

> would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e). Rule 56(f) further provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the pary's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f). Pursuant to Rule 56, plaintiffs must excuse their inability to raise genuine issues of material fact by stating specific reasons. Here, the Rule 56(f) affidavit filed by an attorney for plaintiffs conclusorily stated:

> Plaintiffs are currently unable to present by affidavit or otherwise all facts essential to justify their opposition to defendants' motion for summary judgment, because all facts necessary to determine the lawfulness of defendant's *ex parte* actions are within the exclusive control of defendants and no discovery has been taken by plaintiffs in this cause although various discovery requests have been served.

The very nature of the material "facts"—favorable matters known to Western and disclosed by its agents to the defendants—dispute the contention that they could have been in the exclusive control of the Bank Board. The district court's review was required to focus on the administrative record, which was part of the court record. Plaintiffs were provided a copy. The district court did not rely on any facts outside that record. If materials known to plaintiffs had been omitted from the record, discovery was not needed to develop them. The plaintiffs were required to do more than state that discovery might reveal something of which they were currently unaware.

We also note that, subsequent to the filing of this Rule 56(f) affidavit, plaintiffs filed a multi-volume exhibit in opposition to the Bank Board's summary judgment motion. The district court correctly found that this limited summary judgment proof failed to raise a genuine issue of material fact that the Bank Board's findings "as revealed by the administrative record" were arbitrary or capricious. *See Alliance*, 782 F.2d at 495-96.

Rule 56 does not permit a party to avoid confronting his opponent's summary judgment proof by seeking discovery on factual matters that would not affect the legal basis for summary judgment. Section 1464(d)(6)(A) provides the procedure for appointing a receiver and reviewing that determination. Issues of material fact are narrowed by the statute's limitations of the proceedings. The questions before the district court were whether one or more of the statutory grounds for appointment of the receiver were established in the administrative record and whether the Bank Board acted arbitrarily or capriciously in making its decision. In their brief in district court, plaintiffs failed to identify any genuine issue of material fact which required a postponement for discovery. The court properly stayed discovery and

granted the Bank Board's motion for summary judgment.

III.

The district court's grant of summary judgment dismissing plaintiffs' action to remove the FSLIC as receiver for Western and its denial of interim injunctive relief are

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-86-1627-H

JARRETT E. WOODS, JR., *et al.*,
Plaintiffs

v.

FEDERAL HOME LOAN BANK BOARD, *et al.*,
Defendants

[Filed Feb. 25, 1987]

MEMORANDUM OPINION AND ORDER

Before the Court are Defendants' Motion for Summary Judgment and Brief in Support thereof, filed November 26, 1986; Plaintiffs' Response and Brief in Opposition, filed December 30, 1986; Defendants, Reply, filed January 16, 1987; and a letter from Plaintiffs dated January 16, 1987.

This case arises from the Federal Home Loan Bank Board's ("Bank Board") appointment of the Federal Savings and Loan Insurance Corporation ("FSLIC") as receiver for Western Savings Association ("Western") on September 12, 1986. The receiver was appointed after the Bank Board determined that Western was insolvent, had suffered substantial dissipation of assets due to violations of rules or regulations and unsafe or

unsound practices, and was in an unsafe or unsound condition to transact business. Administrative Record ("A.R.") XV-45, XVI.[1] Plaintiffs' attempts to enjoin the appointment of a receiver were denied by the Court. *See* Orders dated June 20, 1986, October 1, 1986, and October 21, 1986. Defendants now move for summary judgment.

Statement of Facts

Jarrett E. Woods, Jr. ("Woods") acquired Western on August 30, 1982. A.R. I-10. Western at that time reported assets of approximately $34 million. By June 30, 1986 Western reported assets of more than $1.9 billion. A.R. IX-70-71. The increase in reported assets resulted from an aggressive growth policy, including brokered deposits, so-called "jumbo" deposits of $100,000 or more, and large-scale acquisition, development, and construction loans, A.R. IX-70-73, made without equity from the borrower. *See* Equity Participation in Real Estate by Savings and Loans: Implications for Profitability and Risk, A.R., Ex. 3.

During the four years in which Woods was at the helm of Western, the Bank Board, pursuant to its regulatory mandate, conducted a series of examinations of Western. On February 22, 1984, Bank Board examiners found serious underwriting deficiencies at Western. A.R. X-31-46, 175-212. These included highly speculative ventures, such as loans to borrowers of unsubstantiated credit worthiness and loans in excess of a property's purchase price. A.R. X-39. The examiners also found improperly documented large-scale loans to officers and shareholders of other Texas savings associations, and improperly documented participation by Western in loans granted by those associations. A.R. X-39-41.

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[1] For convenience the Court adopts the citation form employed by the parties.

This February 22, 1984 examination led to a special examination on March 20, 1984, with particular attention to Western's portfolio of real estate loans. A.R. X-53-64. The March 20 investigation found that each of a sample of fifteen real estate loans of at least $1,000,000 was made by Western without borrower equity. *Id.* A majority were "wrapped around" existing loans with the result that Western's liens were subordinate to the liens of other lenders. A.R. X-55. At least one was a "flip"—where property was re-sold at an inflated price the day it was purchased—which did not appear to the examiners to be an arm's length transaction. A.R. X-57. Problems of lack of documentation were abundant. A.R. X-53-64.

This March examination led to a June 1, 1984 examination of Western's commercial loans and financial accounting. A.R. X-66-79. The examiners found improperly substantiated credit information. A.R. X-73-75. The examiners also found that Western had improperly accounted for more than $18,000,000, thereby inflating its reported net worth and adding to the Bank Board's concern about Western. A.R. X-72. 12 C.F.R. § 563.23-1.

As a result of these examinations, on June 22, 1984, the FSLIC, pursuant to 12 U.S.C. § 1730(e)(1), adopted Resolution No. 84-328 which included a Temporary Cease and Desist Order against Western and a notice of Western's right to an administrative hearing on the issue. A.R. X-175-196. Western waived its rights to such a hearing and on July 27, 1984 entered into a Consent Order to Cease and Desist. A.R. X-202. Among the Consent Order's requirements were that Western obtain proper appraisal reports as a condition for loans secured by real property, comply with regulations governing loans to one borrower, and conform its accounting procedures to Bank Board requirements. A.R. X-206-212.

Yet, Western did not change its ways. Further examinations by the Bank Board found both lack of com-

pliance with the Consent Decree and additional violations by Western. A.R. X-82-164. A January 30, 1985 examination found unacceptable loan concentrations, losses of more than $11 million on problem loans, continuing irregularities in accounting and appraisals, purchases of new participations in the loans of other associations, new violations of the limitation on loans to one borrower, and other questionable or prohibited practices including numerous transactions with an affiliated entity and unauthorized option transactions. *Id.*

An examination in February 1986 found that Western's 1985 loans totaled well over $1 billion. A.R. X-318. The examiners also found that 1985 losses had reduced Western's reported net worth to only 1.7% of total assets, below the minimum net worth required by law. *See* 12 C.F.R. § 563.13(b). A.R. X-324. A subsequent interim report found new loans without borrower equity, loans without proper appraisals, and additional loans in violation of the limitations on loans to one borrower. A.R. X-326-332. A second interim report in March 1986 questioned the high percentage of loans funded by jumbo and brokered deposits, extensive transactions between Western and the American Solar King Corporation, on whose board of directors sat both Woods and Western's Assistant Secretary, and four more loans made in violation of the limitations on loans to one borrower. A.R. X-391-403.

These examiners' findings, extending over a period of more than thirty months, provide the backdrop against which to view the Bank Board's September 12, 1986 decision to appoint the FSLIC as receiver for Western. The Bank Board determined that Western was insolvent by more than $56 million, had substantially dissipated its assets and was in an unsafe or unsound condition to transact business. A.R. XV-45, XVI. *See* 12 U.S.C. § 1464(d)(6)(A).

Plaintiffs contest both the propriety of the Court's present consideration of Defendants' Motion and the validity of the Bank Board's determination. First, Plaintiffs argue that they are entitled to *de novo* review of the Bank Board's decision and that the Court should delay consideration of this Motion until Plaintiffs have conducted discovery and are better able to challenge the "incomplete and deficient" administrative record. Plaintiffs' Response at 8. Second, Plaintiffs argue that the Bank Board's examinations are inaccurate and that genuine issues of material fact preclude summary judgment.[2]

Legal Standard

The Bank Board has the exclusive power and jurisdiction to appoint a receiver for a FSLIC-insured institution such as Western if "in the question of the Bank Board" there exists *any* of the grounds enumerated in Home Owners' Loan Act, 12 U.S.C. § 1464(d)(6)(A)(i), (ii), or (iii).

Those grounds include:

1. Insolvency in that the assets of the association are less than its obligation to its creditors and others, including its members;

2. Substantial dissipation of assets or earnings due to any violation or violations of law, rules, or regulations, or to any unsafe or unsound practice or practices;

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[2] Plaintiffs argue that the Bank Board relied on two new regulations (the "New Regulations")—12 C.F.R. § 561.6c (the "Classification Regulation") and 12 C.F.R. § 563.17-2 as amended (the "Re-evaluation Amendment") and that these New Regulations are invalid on statutory and constitutional grounds. Because the Bank Board did not rely on these new regulations in appointing a receiver, the Court need not reach that issue. *See* Defendants' Motion at 42-51; Plaintiffs' Response at 5 n.3.

3. An unsafe or unsound condition to transact business.

12 U.S.C. §§ 1464(d)(6)(A), 1729.

The Court's jurisdiction to review the Bank Board's decision to appoint a receiver is limited to determining whether any one of the statutory grounds specified in 12 U.S.C. § 1464(d)(6)(A) existed at the time of the appointment. *Alliance Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 782 F.2d 490, 493 & n.2, *modified on other grounds*, 790 F.2d 34 (5th Cir. 1986), (*citing Biscayne Fed. Sav. & Loan Ass'n. v. Fed. Home Loan Bank Bd.*, 720 F.2d 1499, 1503-04 (11th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984)). *Cf. Fidelity Sav. & Loan Ass'n. v. Fed. Home Loan Bank Bd.*, 540 F.Supp. 1374 (N.D. Cal.), 689 F.2d 803, 810 (9th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983); *San Marino Sav. & Loan Ass'n. Fed. Home Loan Bank Bd.*, 605 F.Supp. 502, 508 (C.D. Cal. 1984); *Tel. Sav. & Loan Ass'n. v. FSLIC*, 564 F.Supp. 862, 869-71 (N.D. Ill. 1981), *aff'd sub. nom., Tel. Sav. & Loan Ass'n. v. Schilling*, 703 F.2d 1019 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983).

The Court is of the opinion that the action of the Bank Board in appointing a receiver should be reviewed under the "arbitrary and capricious" standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).[3] The statute (12 U.S.C. § 1464(d)(6)(A)) authorizes judicial review "upon the merits" but, as the Fifth Circuit has noted, "does not expressly define the scope of judicial review". *Alliance Federal*, 782 F.2d at 493. *See Biscayne Federal*, 720 F.2d at 1503; *Guaranty Savings & Loan Ass'n. v. Fed. Home Loan Bank Bd.*, 794 F.2d

[3] An administrative agency acts arbitrarily and capriciously when its decision has no reasoned basis. *See United States v. Garner*, 767 F.2d 104, 116 (5th Cir. 1985); *First National Bank of Fayetteville v. Smith*, 508 F.2d 1371, 1376 (8th Cir. 1974), *cert. denied*, 421 U.S. 930 (1975).

1339, 1341 (8th Cir. 1986). However, "in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, [the Supreme] Court has held that consideration is to be confined to the administrative record and that no *de novo* proceeding may be held." *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963), (*citing Tagg Bros. & Moorhead v. United States*, 280 U.S. 420 (1930); *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943)).[4] It follows, then, that judicial review of the Bank Board's action is measured against the APA standard. *Guarnty Savings*, 794 F.2d at 1342; *San Marino Savings*, 605 F.Supp. at 508; *Wash. Fed. Sav. & Loan Ass'n. v. Fed. Home Loan Bank Bd.*, 526 F.Supp. 343, 350 (N.D. Ohio 1981).

Review pursuant to the arbitrary and capricious standard of the APA is consistent with congressional intent. "Congress has vested a vast amount of control and authority in the [Bank Board] to regulate savings and loan associations." *Alliance Federal*, 782 F.2d at 493 (*citing Fidelity Sav. & Loan Ass'n v. de la Cuenta*, 458 U.S. 141, 159-67 (1982)). Decisive regulatory action is needed to carry out the congressional mandate. *Cf. North Mississippi Sav. & Loan Ass'n v. Hudspeth*, 756 F.2d 1096, 1101 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 790 (1986) (FSLIC's actions as receiver reviewed under APA arbitrary and capricious standard). In the Court's opinion

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[4] The Supreme Court has interpreted 5 U.S.C. § 706(2)(F) as authorizing *de novo* review "when the action is adjudicatory in nature and the agency factfinding procedures are inadequate" and "when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971); *see also Camp v. Pitts*, 411 U.S. 138, 141-42 (1973). The Administrative Record here shows that the Bank Board's fact-finding procedures were more than adequate. The issues raised by Plaintiffs are not different from the issues before the Bank Board prior to the appointment of a receiver.

the Bank Board cannot effectively carry out its statutory duties if its decisions are subject to *de novo* judicial review.

Plaintiffs point to several district court cases which, they say, hold that an aggrieved association is entitled to judicial review *de novo*. *Collie v. Fed. Home Loan Bank Bd.*, 642 F.Supp. 1147, 1149-52 (N.D. Ill. 1986) (if prior to receiver's appointment the association has had "meaningful opportunity" to make a case in opposition and there was "reasonable factual basis" for Board action, no court trial is required); *Fidelity Savings*, 540 F.Supp. at 1377-78 (*de novo* review might be had where no identifiable administrative record); *Telegraph Savings*, 564 F.Supp. at 870 (*de novo* hearing limited to Board's authority to appoint receiver). The Court is not persuaded that *Collie*, *Fidelity Savings*, and *Telegraph Savings* conflict with its holding in this case. Western had meaningful opportunity to make its case at the administrative stage; there was a reasonable factual basis for the Board's action; there is a comprehensive administrative record. However, in any event, the Court believes that *Carlo Bianchi*, *Guaranty Savings*, and *San Marino* accurately reflect the congressional intent and policy.

As the Eighth Circuit has stated: "If Congress wishes to amend section 1464(d)(6)(A) . . . , it may. We, however, decline to do so." *Guaranty Savings*, 794 F.2d at 1342 & n.4.

Plaintiffs have the burden of showing that the Bank Board's decision was arbitrary and capricious. *Guaranty Savings*, 794 F.2d at 1342. The Bank Board's decision is entitled to a "presumption of regularity". *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). The Court's review of the Board's decision is "confined to the administrative record". *Carlo Bianchi*, 373 U.S. at 715; *Camp v. Pitts*, 411 U.S. at 142; *Guar-*

anty Savings, 794 F.2d at 1343-45; *Washington Federal*, 526 F.Supp. at 350-51.[5]

The question before the Court, then, is this: measured by summary judgment standards, has the Bank Board established that it did not act arbitrarily and capriciously in finding that a statutory ground existed for the appointment of a receiver?

Analysis

To determine whether the Bank Board's decision to appoint a receiver for Western was arbitrary and capricious, the Court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment . . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. [The Court is] not empowered to substitute [its] judgment for that of the agency." *Citizens to Preserve Overton Park*, 401 U.S. at 416; *First National Bank of Fayetteville*, 508 F.2d at 1376.

Western's financial health had been of serious concern to the Bank Board virtually ever since Jarrett Woods bought the association in 1982. Western's aggressive, speculative policies are extensively documented in the voluminous and carefully detailed administrative record. *See* A.R.-X-XIII. That record amply supports the Bank Board's conclusion that Western was insolvent and had so dissipated assets as a result of violations of rules or regulations and unsafe or unsound practices as to be in an unsafe or unsound condition to transact business. A.R.-X-XVI.

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[5] In *Alliance Federal* the Fifth Circuit noted that Plaintiff had failed to rebut the Bank Board's findings "as revealed by the administrative record". 782 F.2d at 495-96. Plaintiffs' summary judgment proof in the case *sub judice* is similarly deficient.

The determination of insolvency was based on the relation of reported net worth to loan losses. Those losses were calculated by seventeen independent appraisals pursuant to 12 C.F.R. § 563.17-1, 571.7. Plaintiffs challenge these audits, providing one of their own prepared by Arthur Young & Co., A.R. XIII-37-90, and questioning the objectivity of the Bank Board's appraisers. The Arthur Young audit, which showed Western to have a net worth in excess of $48-million as of December 31, 1985, was eight months out of date when the reeciver was appointed in September 1986. Western itself reported that in the first six months of 1986 its problem loans rose 30%. The Arthur Young audit, which was before the Bank Board, appears to be based only upon Western's representations of the value of collateral supporting its loans. The Court cannot say that the Bank Board acted arbitrarily or capriciously in rejecting that appraisal in favor of the specific and painstaking findings of the examiners. The Bank Board's September 12 finding of insolvency is thoroughly documented by the facts and reasons set forth in the Administrative Record. The finding is not vitiated by Plaintiffs' essentially anecdotal critique of the validity of the examiners' appraisals.

The Administrative Record is also replete with instances of violations of rules or regulations and unsafe or unsound banking practices. Loans were made without proper appraisals of collateral. A.R. X-90-122, 327-345. 12 C.F.R. § 563.17-1(c)(1)(iii). Loans were made in excess of the limitations on loans to one borrower and in violation of the July 27, 1984 Cease and Desist Order agreed to by Western. A.R. X-40-41, 128, 331-33, 401-03. 12 C.F.R. § 563-9-3(b)(2)(i). Large amounts were loaned via high-risk acquisition, development and construction loans in which borrowers provided no equity, and these risky ventures were funded through volatile jumbo and brokered deposits. A.R. X-37-39, 63-64, 94-96, 392. Regulations on the classification of investments

were continually ignored. A.R. X-55-63, 123-27, 335-36. 12 C.F.R. §§ 563.17-1(c), 563.23-3, 536c.12(b). Required information on the financial health of borrowers was never collected. A.R. I-14, X-333. 12 C.F.R. § 563.17-1(c)(1)(iv). Limits on liability growth were exceeded. A.R. X-336-337. 12 C.F.R. § 563.13-1(a)(1). Improper financial options transactions were conducted. A.R. X-140, 12 C.F.R. § 563.7-5. And prohibited transactions with affiliated entities were routinely undertaken. A.R. X-129-136, 393, 12 C.F.R. §§ 563.43, 571.7.

In addition Bank Board examiners found that the total value of assets dissipated by five loans exceeded $105,000,000. *See, e.g.*, the so-called Roberts, Kennington, Baypointe, Reagin and Davis loans. A.R. X-319-20, 347-67; I-29-30; I-15-28; I-34-35. Plaintiffs respond by attacking the appraisers' objectivity, their lack of ties to Texas, and the assumptions on which the appraisals were predicated. Plaintiffs' response is not factual; posed against the Administrative Record, Plaintiffs' response does not raise a material fact issue.[6] The Court need not further detail the substantial dissipation of assets resulting from these violations of rules or regulations and unsafe or unsound practices or Western's resultant unsafe or unsound condition to transact business. The Administrative Record documents both with great specificity.

In sum, the Court finds that the carefully detailed Administrative Record amply supports the Bank Board's determinations.

Under Fed.R.Civ.P. 56(c) summary judgment shall be granted where "the pleadings, depositions, answers to

[6] Even if their Response were factual, Plaintiffs leave unchallenged many transactions and practices which provide ample evidence that the Bank Board's decision to appoint a receiver was not arbitrary and capricious. It is only necessary that one of the grounds specified in 12 U.S.C. § 1464(d)(6)(A) exist.

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The Court concludes that there exists no genuine issue as to any material fact. The summary judgment proof establishes that the Bank Board's decision to appoint a receiver for Western had a reasoned basis, considered all the relevant factors, and was not arbitrary or capricious. One or more of the statutory grounds enumerated in 12 U.S.C. § 1464(d)(6)(A) existed for such an appointment.

The story of Western is the story of a management oblivious to the recklessness of its policies. As the Fifth Circuit wrote in response to an equally reckless course:

> If ever an enterprise chartered as an alleged savings and loan association deserved the appointment of a conservator to preserve the integrity of the financial community, this is it.

Alliance Federal, 782 F.2d at 491.

Accordingly, Defendants' Motion for Summary Judgment is GRANTED. Judgment will be entered accordingly.

SO ORDERED.

DATED: February 25, 1987.

/s/ Barefoot Sanders
BAREFOOT SANDERS
Acting Chief Judge
Northern District of Texas

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA-3-86-1627-H

JARRETT E. WOODS, JR., *et al.*,
Plaintiffs,

v.

FEDERAL HOME LOAN BANK BOARD, *et al.*,
Defendants.

[Filed Oct. 22, 1986]

AGREED MODIFIED ORDER

On September 30, 1986, the Court held a hearing on Plaintiffs' Motion for Temporary Restraining Order, filed September 22, 1986, and for a preliminary injunction, it having been agreed by the parties that such hearing be treated as a hearing on a motion by Plaintiffs for a preliminary injunction due to the Court's ruling that it lacks jurisdiction to grant Plaintiffs any form of injunctive relief in this action.

After considering the pleadings and briefs, and the representations of counsel, the Court rules, for reasons stated on the record from the bench, that Plaintiffs' Motion should be denied. The Court held that Plaintiffs had not met the standards for a temporary restraining order or a preliminary injunction, *see Enterprise International, Inc. v. Corporation Estatal Petrolera Ecuatoriana*, 762

F.2d 464, 471 (5th Cir. 1985), and, alternatively, that the Court does not have jurisdiction to grant either a temporary restraining order or a preliminary injunction to Plaintiffs in this action.

Accordingly, Plaintiffs' September 22, 1986 Motion for Temporary Restraining Order and its motion for a preliminary injunction were DENIED.

SO ORDERED.

DATED: October 21, 1986.

/s/ Barefoot Sanders
BAREFOOT SANDERS
United States District Judge

AGREED:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA-3-86-1627-H

JARRETT E. WOODS, *et al.*,
Plaintiffs,

v.

FEDERAL HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, WALTER FAULK, JACK ANDERSON, DAVID BRADLEY, EDWIN J. GRAY, DONALD I. HOVDE, JOSEPH SELBY, and WESTERN FEDERAL SAVINGS AND LOAN ASSOCIATION,
Defendants.

[Filed Apr. 1987]

AGREED ORDER

On this day came on to be heard Defendants' Motion for Certification of Final Judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. It appearing to the Court that there is no just reason to delay entry of final judgment on Defendants' Motion for Summary Judgment pursuant to this Court's Memorandum Opinion and Order dated February 25, 1987, this Court expressly determines that there is no just reason for delay and expressly directs entry of such judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

This Court further finds that there is no relationship between the issues presented for determination during the summary judgment proceeding and the issue presented by Defendants in its Motion for Accounting and

Reimbursement of attorneys fees paid by Western to Jones, Day, Reavis & Pogue, Michael J. Vaughn and/or Vaughn, Lynn & Hightower and Naman, Howell, Smith & Lee.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Final Judgment be entered herein pursuant to the Court's Memorandum Opinion of February 25, 1987 and Rule 54(b) of the Federal Rules of Civil Procedure.

Dated: April 9, 1987

/s/ Barefoot Sanders
BAREFOOT SANDERS,
Acting Chief Judge
Northern District of Texas

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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-1750 and 87-1272

D.C. Docket No. CA-3-86-1627-H

JARRETT E. WOODS, JR., *et al.*,
Plaintiffs-Appellants,

versus

FEDERAL HOME LOAN BANK BOARD, *et al.*,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Texas

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[Filed Aug. 27, 1987]

Before CLARK, Chief Judge, BROWN, and JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs of appeal, to be taxed by the Clerk of this Court.

August 27, 1987

ISSUED AS MANDATE: Sep. 18, 1987

Supreme Court, U.S.
FILED
FEB 26 1988
JOSEPH F. SPANIOL, JR.

No. 87-860

In the Supreme Court of the United States

OCTOBER TERM, 1987

JARRETT E. WOODS, JR., ET AL., PETITIONERS

v.

FEDERAL HOME LOAN BANK BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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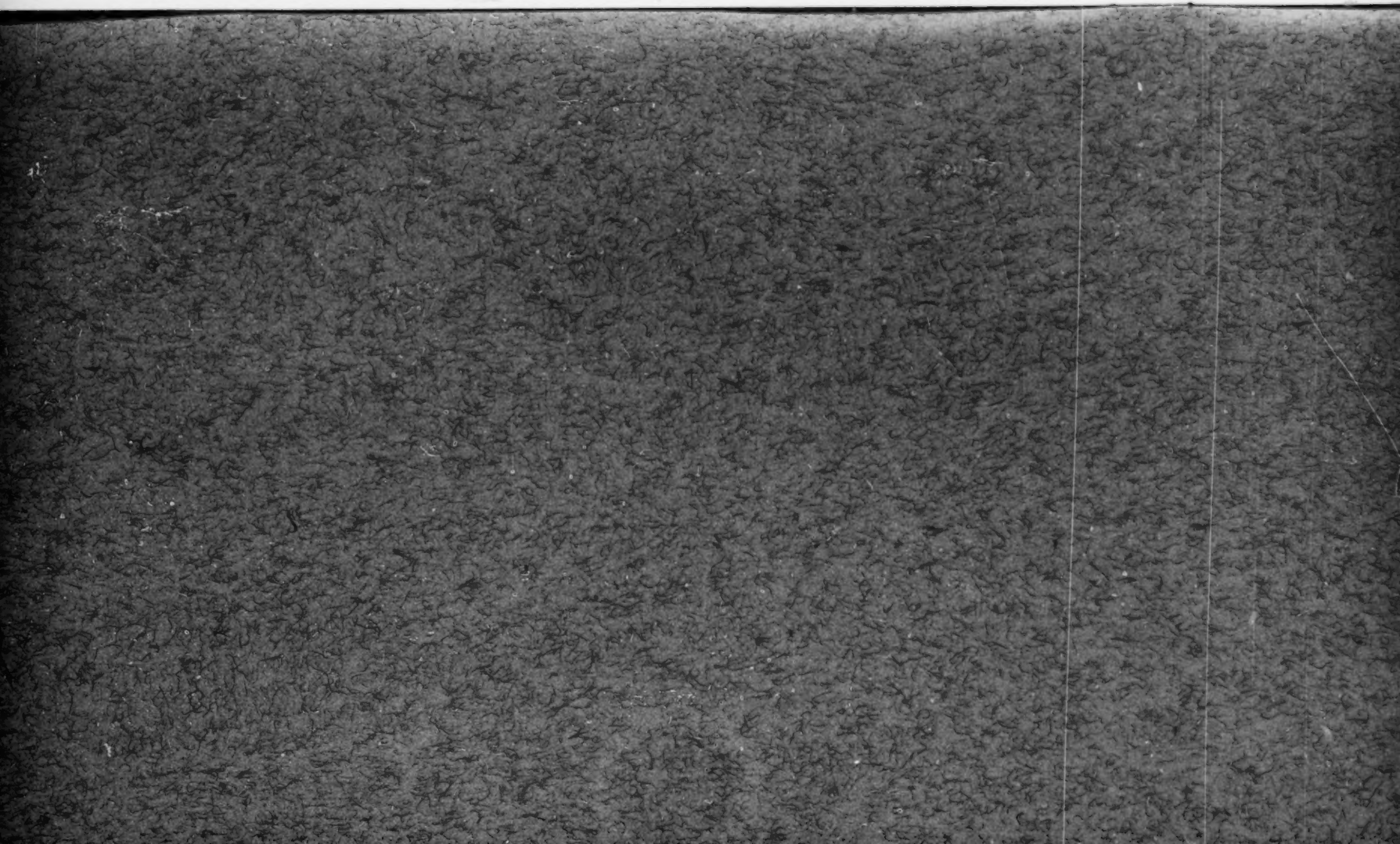

QUESTION PRESENTED

Whether the court of appeals properly affirmed a district court order upholding the Federal Home Loan Bank Board's appointment of a receiver for a federally-insured savings and loan association.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-860

JARRETT E. WOODS, JR., ET AL., PETITIONERS

v.

FEDERAL HOME LOAN BANK BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 826 F.2d 1400. The opinion of the district court (Pet. App. 30a-41a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 46a) was entered on August 27, 1987. The petition for a writ of certiorari was filed on November 25, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Federal Home Loan Bank Board appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as receiver for petitioner Western Savings Association

(Western), a financially-distressed, federally-insured thrift institution.[1] Petitioners, including Western, the thrift's parent corporation, and two officers, challenged the Bank Board's actions on various constitutional and statutory theories. The district court rejected petitioners' challenges and the court of appeals affirmed.

1. Petitioner Woods acquired Western in 1982. Prior to that time, Western was a relatively small federally-insured savings and loan institution that relied on deposits by local individuals and businesses to make single-family mortgage loans. Woods, however, adopted an agressive growth policy that relied on "brokered" and "jumbo" deposits to make various types of high risk loans. As a result of this policy, Western's book assets grew from approximately $34 million in 1982 to more than $1.9 billion in 1986. See Pet. App. 3a, 31a.[2]

The Bank Board conducted a series of examinations of Western between 1982 and 1986. In February 1984, the

[1] The Bank Board is an independent agency of the Executive Branch of the United States that is responsible, pursuant to Section 5 of the Home Owners' Loan Act of 1933, 12 U.S.C. (& Supp. IV) 1464, for the "organization, incorporation, examination, operation, and regulation" of federal savings and loan associations. 12 U.S.C. 1464(a). The Bank Board is also the operating head of FSLIC, the corporate governmental agency of the United States that is responsible, pursuant to Title IV of the National Housing Act, 12 U.S.C. (& Supp. IV) 1724 *et seq.*, for insuring deposits in all federally-chartered savings and loan associations and most state-chartered savings and loan associations.

[2] During this period, the Bank Board had cautioned savings and loan associations about the sort of aggressive growth policy Western followed here. See, *e.g.*, 50 Fed. Reg. 6891, 6894-6896 (1985). Brokered deposits and jumbo deposits can be very volatile and often are characterized by above-market rates of return and short maturity terms. An association that seeks to offset the high cost of attracting and retaining those funds by investing them in high-rise, high-return projects is more likely to default and trigger the FSLIC insurance than a more conservatively managed association.

Bank Board's examiners filed a supervisory "adverse rating report" describing Western's rapid growth and risky lending practices. The examiners found "serious underwriting deficiencies in highly speculative ventures" (Pet. App. 3a) and improper documentation of large complex loans. The Bank Board conducted a special examination in March 1984, focusing on Western's portfolio of real estate loans. The examiners discovered numerous large loans with questionable security and loan documentation. The Bank Board examiners commenced a special examination in June 1984 to investigate Western's commercial loan and financial accounting procedures. The examiners determined that Western had improperly inflated its reported net worth by more than $18 million through improper accounting practices. *Id.* at 3a-4a, 31a-32a.

In response to these disclosures, the Bank Board issued a temporary cease-and-desist order finding that Western had engaged in unsafe and unsound practices in violation of federal law and informed Western that it was entitled to an administrative hearing to contest the Board's findings. Western waived its right to a hearing and consented to a final cease-and-desist order restricting its lending practices and requiring it to obtain appraisals for loans secured by real estate, to comply with rules regulating loans to one borrower, and to conform its accounting practices to Bank Board requirements. Pet. App. 4a, 32a.

Subsequent examinations revealed that, despite the Bank Board's supervisory efforts, Western was continuing its unsafe and unsound practices and was violating the cease-and-desist order. The Bank Board examiners discovered that Western had made new loans without proper appraisals and had continued to violate the rules regulating loans to one borrower. They also discovered extensive transactions be-

tween Western and a corporation whose board of directors included Western officers. Pet. App. 4a-5a, 32a-33a.[3]

On September 12, 1986, the Bank Board determined that Western was actually insolvent by at least $56 million as a result of losses in excess of $120 million that were not reflected on Western's books. The Bank Board found that these losses were the result of violations of law and unsafe or unsound practices by Western. The Bank Board concluded that Western was in an unsafe and unsound condition to transact business and appointed FSLIC as receiver for Western in accordance with Section 5(d)(6)(A) of the Home Owners' Loan Act of 1933, 12 U.S.C. (Supp. IV) 1464(d)(6)(A).[4] The receiver took possession of Western and entered into a purchase and assumption transaction with a newly created federal savings and loan association (Western Federal). Pet. App. 5a-6a, 33a.

2. Petitioners commenced this action in the United States District Court for the Northern District of Texas challenging the Bank Board's action. See § 5(d)(6)(A), 12

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[3] Bank Board regulations require thrift institutions to submit monthly, quarterly, and annual financial statements and answer all Bank Board inquiries. Throughout this period, the Bank Board's examiners also held numerous meetings and consultations with Western's management and board of directors in the course of analyzing Western's loan files and its financial statements. They obtained independent appraisals of property securing large loans and caused a report to be prepared by Western's outside accountants. Pet. App. 5a.

[4] Section 5(d)(6)(A) of the Home Owners' Loan Act empowers the Bank Board to appoint a receiver if it finds that a federally-chartered association is insolvent, has suffered a substantial dissipation of assets as a result of improper practices, is in an unsafe or unsound condition to transact business, has wilfully violated a final cease-and-desist order, or has prevented the Board from inspecting its records. See 12 U.S.C. (Supp. IV) 1464(d)(6)(A). The National Housing Act extends this power to federally-insured, state-chartered institutions, such as Western. See 12 U.S.C. 1729(c)(1)(B).

U.S.C. (Supp. IV) 1464(d)(6)(A). The district court granted summary judgment in favor of the Bank Board, concluding that the statutory grounds for appointment of a receiver had been satisfied. The district court held that the materials submitted by petitioners in opposition to the Bank Board's motion for summary judgment failed to demonstrate the existence of a genuine issue as to any material fact. Pet. App. 40a-41a.

The court of appeals affirmed. The court agreed that judicial review of a Bank Board decision appointing a receiver is limited to determining whether one of the statutory grounds for that action, set forth in Section 5(d)(6)(A), existed at the time of the appointment (Pet. App. 9a). The court of appeals also agreed with the district court that the Bank Board's decision to appoint a receiver is subject to judicial review under the "arbitrary and capricious" standard (*id.* at 9a-15a). The court rejected petitioners' contention that the record in this case did not support the Bank Board's findings (*id.* at 16a-18a).

The court of appeals also rejected petitioners' claim that the procedures afforded them by the district court deprived them of due process. Pet. App. 18a-25a. It recognized that the risk of failure of a federally-insured savings and loan association falls most heavily on FSLIC as insurer, and that Congress therefore had granted the Bank Board "the strongest powers constitutionally possible in order to preserve depositor confidence in the savings institutions of this country and to minimize loss and depletion of FSLIC insurance funds" (*id.* at 21a). The court concluded that "[t]he method provided—a court review of agency action under the arbitrary or capricious standard—is adequate to assure against the risk of mistaken deprivations" (*ibid.*).

Finally, the court of appeals rejected petitioners' assertion that the district court's grant of the Bank Board's summary judgment motion was inappropriate. Pet. App.

25a-29a. The court stated that petitioners had ample opportunity to rebut the Bank Board's factual assertions or to demonstrate the existence of material facts in dispute and that petitioners had failed to carry their burden (*id.* at 25a-26a).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court accordingly is not warranted.

1. Petitioners first contend (Pet. 9-12) that the Bank Board's appointment of a federal receiver, subject to post-appointment judicial review, violates due process because it denied them a hearing conducted " 'at a meaningful time and in a meaningful manner' " (Pet. 10 (citations omitted)). That claim is clearly without merit. The procedures the Due Process Clause requires vary depending on the precise nature of the government function and the private interests involved. See, *e.g.*, *Brock* v. *Roadway Express, Inc.*, No. 85-1530 (Apr. 22, 1987), slip op. 7-8 (plurality opinion); *id.* at 1-2 (White, J., concurring in part and dissenting in part); *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 545 (1985); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961). In this instance, Congress has properly determined that due process is satisfied by subjecting the Bank Board's decision appointing a receiver to post-appointment judicial review, as set forth in Section 5(d)(6)(A) of the Home Owners' Loan Act. See 12 U.S.C. (Supp. IV) 1464(d)(6)(A).[5]

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[5] Section 5(d)(6)(A) gives the Bank Board exclusive authority to appoint a receiver, stating (12 U.S.C. (Supp. IV) 1464(d)(6)(A)):

> The Board shall have exclusive power and jurisdiction to appoint a conservator or receiver. If, in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein pro-

The government has a strong interest in preserving public confidence in thrift institutions and in protecting the integrity of the federal insurance program. See *Fidelity Federal Savings & Loan Ass'n* v. *De La Cuesta,* 458 U.S. 141 (1982); *Fahey* v. *Mallonee,* 332 U.S. 245 (1947). Banking, in turn, "is one of the longest regulated and most closely supervised of public callings" (*Fahey*, 332 U.S. at 250). When a thrift institution verges on failure, the government must act quickly and decisively to protect the public interest. Thus, Congress reasonably concluded that the Bank Board should be able to appoint a receiver immediately, subject to post-appointment judicial review. Thrift institutions have long been subject to such procedures. In *Fahey,* this Court specifically upheld the constitutionality of Bank Board regulations, promulgated under a previous version of Section 5(d) (12 U.S.C. (1946 ed.) 1464(d)), that provided for post-appointment administrative review of the receivership decision, stating, "the delicate nature of the institution and the impossibility of preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this summary manner" (*Fahey,* 332 U.S. at 253). Certainly, the amended Section 5(d) at issue here, which provides greater due process protections by sub-

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> vided exists, the Board is authorized to appoint ex parte and without notice a conservator or receiver for the association. * * *.

That section then provides for post-appointment judicial review of the Bank Board's decision, stating (*ibid.*):

> In the event of such appointment, the association may, within thirty days thereafter, bring an action in the United States district court * * * for an order requiring the Board to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver. * * *.

jecting the Bank Board's decision to immediate judicial review, is *a fortiori* constitutional.[6]

Petitioners further suggest (Pet. 11-12) that the district court denied them due process by granting the Bank Board's motion for summary judgment. As the court of appeals and the district court explained, petitioners had a full and fair opportunity to contest the Bank Board's decision to appoint a receiver in the post-appointment judicial review proceeding. They received notice and a full explanation of the Bank Board's justification for its action, which was set forth in the administrative record.[7] The courts below fully considered petitioners' challenge to the Bank Board's decision as set forth in petitioners' legal briefs, their witnesses' affidavits, and their multi-volume exhibits. Pet. App. 25a-28a, 38a-41a. The courts properly concluded that the Bank Board had demonstrated with overwhelming clarity that its appointment of a receiver was justified and that petitioners' "essentially anecdotal critique" of the Bank Board's decision failed to raise a material factual issue (*ibid.*).[8] The Bank Board was accordingly entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56. The grant of sum-

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[6] Moreover, Western voluntarily submitted to these procedures when it sought federal deposit insurance. Thus, Western is poorly postured to challenge those procedures now. See *Fahey*, 332 U.S. at 255-256.

[7] Petitioners also had innumerable opportunities prior to the appointment of the receiver to contribute to the fact-finding process and to make their views, arguments, and factual positions known to the Bank Board. The record demonstrated that these views were presented to and considered by the Bank Board (Pet. App. 5a).

[8] As the district court further observed, "Even if [petitioners'] Response were factual, [petitioners] leave unchallenged many transactions and practices which provide ample evidence that the Bank Board's decision to appoint a receiver was not arbitrary and capricious. It is only necessary that one of the grounds specified in 12 U.S.C. § 1464(d)(6)(A) exist." Pet. App. 40a n.6; see also *id.* at 26a.

mary judgment did not deny petitioners a meaningful hearing; it simply reflected the insubstantiality of their claims.

2. Petitioners next contend (Pet. 12-17) that the district court erred in reviewing the Bank Board's decision to appoint a receiver under an "arbitrary and capricious" standard. They argue that Section 5(d)(6)(A) of the Home Owners' Loan Act required the district court to make a de novo determination whether a receiver should be appointed. The court of appeals correctly rejected this argument. As we have already explained (note 5, *supra*), Section 5(d)(6)(A) gives the Bank Board exclusive power to appoint a conservator or receiver if, in its opinion, one of the statutory grounds for appointment exists; the district court's role is limited to post-appointment judicial review. The section specifically provides that "the court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver" (12 U.S.C. (Supp. IV) 1464(d)(6)(A)). The court of appeals correctly concluded that the court should make its determination under the usual standards for judicial review of agency action: the court should examine whether the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. 706(2)(A)). See *Camp* v. *Pitts,* 411 U.S. 138 (1973).

Petitioners are mistaken in contending that Section 5(d)(6)(A)'s use of the phrase "upon the merits" displaces the normal judicial standards for reviewing agency action and requires the district court to make a de novo determination whether a receiver should be appointed. As the court of appeals recognized, the plain language of the phrase "upon the merits" does not specify a standard for judicial review; instead, the phrase indicates that the court's decision whether to grant relief must be "based on the existence of statutory grounds for appointment" (Pet. App. 11a). Indeed, if Congress had intended to take the extraordinary step of allowing courts to conduct a de novo examination

of the Bank Board's receivership decisions, it would have made that intention manifest. Here, as in *Camp*, the agency's decision is subject to review under the "arbitrary and capricious" standard.

Finally, we note that there is no conflict among the courts of appeals on this statutory question requiring this Court's resolution. The two courts of appeals that have considered this question—the Fifth Circuit here, and the Eighth Circuit in *Guaranty Savings & Loan Ass'n* v. *Federal Home Loan Bank Bd.*, 794 F.2d 1339 (1986)—are in agreement. There is some disharmony among the district courts on the question. See Pet. App. 12a-13a.[9] But the courts of appeals are capable of resolving those inconsistencies. There is no conflict warranting this Court's review.

3. Finally, petitioners contend (Pet. 17-18) that even under the "arbitrary and capricious" standard, they were entitled to "make a searching inquiry into the 'whole' record" through extensive discovery. The Bank Board's reasons for appointing a receiver were, however, clear from and amply supported by the detailed administrative record. The

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[9] For example, in *San Marino Savings & Loan Ass'n* v. *Federal Home Loan Bank Bd.*, 605 F. Supp. 502, 508 (C.D. Cal. 1984), and *Washington Federal Savings & Loan Ass'n* v. *Federal Home Loan Bank Bd.*, 526 F. Supp. 343, 350, 353-354 (N.D. Ohio 1981), the district courts applied an arbitrary or capricious standard of review. In *Telegraph Savings & Loan Ass'n* v. *FSLIC*, 564 F. Supp. 862 (N.D. Ill. 1981), cited by petitioners, the court stated that the statute "seems to require" de novo review (*id.* at 869), but in fact applied a very deferential standard, recognizing a presumption in favor of the Bank Board's determination and concluding that the reasonableness of the decision was not an issue for the court to consider (*id.* at 875-877). In *Fidelity Savings & Loan Ass'n* v. *Federal Home Loan Bank Bd.*, 540 F. Supp. 1374 (N.D. Cal. 1982), the court concluded in dicta that de novo review was appropriate but decided the case on other grounds. The court of appeals later reversed the district court's decision. See 689 F.2d 803 (9th Cir. 1982), cert. denied, 461 U.S. 914 (1983).

courts below properly concluded that petitioners' response to the Bank Board's motion for summary judgment failed to identify any genuine issue of material fact that required postponement for discovery. See Pet. App. 28a, 40a-41a. As the court of appeals explained, Fed. R. Civ. P. 56 "does not permit a party to avoid confronting his opponent's summary judgment proof by seeking discovery on factual matters that would not affect the legal basis for summary judgment" (Pet. App. 28a). The court's resolution of this fact-bound issue was correct and does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER TERM, 1987

JARRETT E. WOODS, JR., JOSEPH L. BIEGEL,
WESTERN SAVINGS ASSOCIATION, and
WESTERN CAPITAL CORPORATION,
Petitioners,

v.

FEDERAL HOME LOAN BANK BOARD,
FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
WALTER, FAULK, DAVID BRADLEY, EDWIN J. GRAY,
JOSEPH SELBY, and
WESTERN FEDERAL SAVINGS AND LOAN ASSOCIATION,
Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY

Respondents in their brief opposing a writ of certiorari fail to recognize one of the important ways in which the district court's application of the arbitrary and capricious standard of review violates Petitioners' right to a meaningful hearing. In applying the arbitrary and capricious standard of review, the district court decided that its review was "confined to the administrative record." *See* Petition for Writ of Certiorari at 37a. However, in

this case the administrative record before the district court was admittedly incomplete and consisted solely of the one-sided, uncrossexamined, and untested evidence that the government chose to submit to support the taking. It was not an administrative record compiled in the course of an adjudication or hearing in which the Petitioners were able to participate.

It is, therefore, evident, under its application of the arbitrary and capricious standard of review, that the district court did not review, and could not have reviewed, the evidence presented by Petitioners in any meaningful way consistent with constitutional requirements. Moreover, the district court refused to permit any discovery to complete the administrative record.[1] Instead, the district court upheld the government's taking based solely on the government's constitutionally deficient evidence.

Upholding the constitutional rights of Petitioners to a meaningful hearing at a meaningful time would not impede the government's interest in preserving the public confidence in thrift institutions and in protecting the integrity of the federal insurance program. The government would not be prohibited from taking action. Upholding those rights, however, would, after the government takes action, provide the check against mistaken deprivations required by the Constitution and would assure that the government is properly exercising its duties in accord with constitutional constraints. Without the Court's consideration of this case, it is likely that the constitutional violations complained of by Petitioners will be repeated in many other cases.

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[1] The allegations made by Respondents to support the taking are clearly subject to challenge, and discovery is necessary therefor. For example, much is made of Western Saving Association's use of brokered deposits. Contrary, however, to Respondents' indications that brokered deposits are improper, the Federal Home Loan Bank Board has taken actions to encourage brokered deposits. See The Bank Board Watch, September 11, 1987 at H-2.

CONCLUSION

For the reasons set forth above, and as more fully set forth in the Petition for Writ of Certiorari, a writ of certiorari should be granted.

Respectfully submitted,

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